United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT AND JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,496

654

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LOUIS KUZMINSKY

Appellant,

v.

LEROY WOODARD

Appellee.

United States Court of Appeals
For the
District of Columbia Circuit
FILED FEB 14 1962
Joseph W. Stewart
CLERK

Appeal from Judgment of the United States District Court for the District of Columbia

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STATEMENT OF QUESTIONS PRESENTED

The questions presented by this appeal are:

First, did the lower Court err in granting the defendant's motion for a directed verdict in a case where the plaintiff was a pedestrian crossing a main artery of traffic while in a marked crosswalk and was struc k by the defendant's vehicle traveling south at a time when the plaintiff had been waiting for traffic coming in the opposite direction to pass?

Second, assuming the lower Court erred in directing a verdict in defendant's favor and the matter must be retried, then the further questions presented by the rulings of the trial court are the following:

(a) Did the trial court err in denying plaintiff's proffered instructions because there was sufficient evidence to warrant instructions on

1) the doctrine of "last clear chance?"

2) the duties and responsibilities of drivers, particularly at intersections

3) the driver's duty to give full time and attention to his driving

4) when it is negligence to strike a pedestrian

5) the obligations of a driver to stop or turn aside his vehicle or anticipate presence of pedestrian s

6) on the driver's duty to yield the right of way, and

7) on the driver's duty to drive at a reasonable speed and keep proper lookout and sound horn if necessary

(b) Did the Court err in refusing to admit in evidence traffic regulations relative to the driver's duty of full time and attention and reasonable speed ?

(c) Did the trial Court err in granting defendant's proffered instructions relating to the plaintiff's duty to observe and to use care although they did not distinguish between a pedestrian in a marked crosswalk and one walking between intersections?

(d) Did the trial Court err in instructing the jury on the "unavoidable accident" where, it was claimed that on the plaintiff's theory, the defendant was negligent, and on defendant's theory the plaintiff was negligent?

(e) Did the trial Court err in instructing the jury on contributory negligence when the trial Court omitted the element of causation from that charge?

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IN THE
UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

No. 16,496

LOUIS KUZMINSKY

Appellant

vs.

LEROY WOODARD

Appellee

Appeal from Judgment of the United States
District Court for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment in a negligence action in favor of the defendant upon a directed verdict by the Court in the United States District Court for the District of Columbia. The jurisdiction of this Court is conferred by 28 U.S.C 1291; the jurisdiction of the Court below was based on D C. Code 11-306. The Motion for Directed Verdict

made by defendant was granted on May 22, 1961 (J.A. 11, 12). The Notice of Appeal was filed June 16, 1961 (J.A. 13).

STATEMENT OF FACTS

Appellant is LOUIS KUZMINSKY, who claimed he suffered substantial injuries and damages (including, among other things, penetrating wound of right calf, permanent knee injury and weakening of right leg and substantial hospitalization and loss of wages) when he was struck by an automobile owned and operated by the appellee, LEROY WOODARD (J.A. 4, 5).

Appellant LOUIS KUZMINSKY was the plaintiff in the trial Court and appellee, LEROY WOODARD, was the defendant. Appellant's brief will refer to the parties in this manner.

MR. KUZMINSKY'S version of the accident and the surrounding facts was essentially this: that he was a painter, a man of fifty-seven, at the time of the accident involved; that he was struck by the defendant's vehicle on August 11, 1958, at about 7:00 A.M. while in the crosswalk at Otis Place and Georgia Avenue Northwest in Washington, D.C.; that he left his home on that day, parked his car and walked to the marked crosswalk where he was "supposed to cross Georgia Avenue"; that he looked both ways before leaving the west curb; did not see any traffic

and hence started to cross Georgia Avenue, walking in an easterly direction from the west curb to go to the lunchroom on the East side of Georgia Avenue; that he took seven or eight steps from the west curb and saw a car to his right coming "pretty fast" from the south on Georgia Avenue, going north, and believing that he would not be able to cross the street without getting hit by this car coming from his right, he stopped and waited for the car to go by, remaining in the crosswalk in a line with a point just inside the streetcar platform (J.A. 26,27,28, 30,31, 32, 48). The plaintiff testified that when the car from the right came up to Otis Place, he (the plaintiff) was about to look to his left to see if it was safe to proceed; that as he moved his head to look to the left, he was hit by defendant's vehicle and fell to the ground and later was brought to the hospital (J.A. 27, 28, 29); that he watched for the northbound car to pass at a point in the marked crosswalk which he stated was about seventeen inches from the car track in front of him and four or five inches from an imaginary line drawn from the streetcar platform through the crosswalk (J.A. 27, 32, 48). The plaintiff also testified that the streetcar platform involved (the one nearest the west curb) was about ninety feet long; that there were four lanes of traffic, two going north and two south on Georgia Avenue; that there were no traffic signals at the intersection; that the road was straight and "pretty flat" and that it was a

clear, sunny day (J.A. 28,29). The plaintiff stated he was not on the streetcar platform (J.A. 29). He testified he didnot know what part of the automobile hit his head but he knew he was "hooked"; nor what part of the vehicle hit his leg, although he believed it was the bumper (J.A.30,31). He stated he did not know which one; it "could have been the back bumper" (J.A. 31).

A witness to the accident, IRVING TITTLEBAUM, testified as follows: he was on his way to work on the day involved and stopped at the stop sign on the west side of Georgia Avenue at the intersection of Georgia Avenue and Otis Place Northwest; that he noticed MR. KUZMINSKY whom he had previously known, across the street waiting in the crosswalk; that when he turned his head to look for the traffic, the next thing he knew when he turned back around was that MR. KUZMINSKY was on the ground (J.A. 33,34). He testified that he believed the plaintiff was lying on the car tracks (J A. 34). On cross examination, he repeated that MR. KUZMINSKY was "in the crosswalk" (J.A. 36). The witness did not know how far away from the platform the plaintiff was standing nor whether or how far in from a line to the edge of the platform the plaintiff was standing (J.A. 36); he did state, however, that "the plaintiff was standing in the crosswalk for what "must have been a couple seconds"(J.A. 35). In a written statement he gave on February 24, 1960, made about fourteen months before trial, MR. TITTLEBAUM stated that he "noticed MR. LOUIS KUZMINSKY standing in

the crosswalk near the south end of the streetcar loading platform"; and that he also noticed a "car going south on Georgia Avenue in the streetcar tracks" (J.A. 37). At the time of impact, however, the witness testified that he was looking south and therefore did not see any car coming from the north actually strike the plaintiff (J A. 36, 37).

The defendant, LEROY WOODARD, was called by the plaintiff as an adverse witness. His pertinent testimony was that on the date and time in question (August 11, 1958, just prior to 7:00 A.M.) he stopped at New Hampshire Avenue and Georgia Avenue, traveling south on Georgia Avenue; that the distance from this point to Otis Place is about 150 yards or a block and a half; that he saw MR. KUZMINSKY when he approached the northern end of the streetcar platform; that when the defendant first saw him, MR. KUZMINSKY was standing on the southern tip of the streetcar platform which declines slightly on the tip; that MR. KUZMINSKY was facing east, and standing still; that he watched the plaintiff as he traveled all the way down the streetcar platform, at least in the periphery of his vision; that he decreased his speed from twenty-two miles per hour to twenty miles per hour when he traveled alongside the platform; that he first knew his vehicle struck the plaintiff when he felt "some sort of brushing effect against the car"; that he was driving directly on the streetcar tracks and after feeling this brushing effect, brought his car to a halt (J.A. 39-47).

The loading platform was testified to be about 90 feet long (J.A. 28).

Dr. WINIK, plaintiff's physician, testified that the plaintiff suffered a penetrating wound of the inner side of the right calf, a cut over the left temple, a sprain of the right knee and multiple abrasions and contusions (J. A. 49).

The plaintiff offered traffic regulations 22 (a), 22 (c), 25, 30, 52, 54 and 99 (c) in evidence (J. A. 52). The Court admitted in evidence traffic regulations 22 (c), 52 (a) and 54 (J. A. 57). The defendant moved for a directed verdict (J. A. 50, 57). The Court reserved its decision and submitted the case to the jury (J. A. 51).

The jury was unable to reach a verdict and was therefore discharged. (J. A. 90, 91).

Thereafter, on May 22, 1961 the Court filed a memorandum opinion granting the Motion for Directed Verdict (J. A. 11, 12). The Notice of Appeal was filed on June 16, 1961 (J. A. 13).

On September 15, 1961, this Court, sua sponte, issued an Order to Show Cause why this appeal should not be dismissed as premature. On January 23, 1962, after the appellant filed in opposition to the Order and then filed an Order of Judgment, Nunc Pro Tunc, this Court discharged the rule to show cause (J. A. 13a, 13b).

STATEMENT OF POINTS

1. The lower Court erred in granting defendant's Motion for a Directed Verdict after reserving decision under Rule 50, Federal Rules of Civil Procedure.

2. The lower Court erred in denying instructions on the doctrine of "last clear chance", the duties and responsibilities of drivers at intersections, the driver's duty to give full time and attention, in failing to instruct when it is negligence to strike a pedestiran, in failing to instruct as to the obligation of a driver to stop or turn aside his vehicle or anticipate the presence of pedestrians, in failing to instruct the jury on the driver's duty to drive at a reasonable speed and in his duty to yield the right of way.

3. The lower Court erred in refusing to admit, or in erroneously admitting in evidence certain traffic regulations relative to the driver's duty to yield the right of way, to drive at a reasonable speed, to give full time and attention, to keep a proper lookout, and sound horn if necessary, and the pedestrian's duty while crossing.

4. The lower Court erred in granting such of defendant's instructions as erroneously failed to distinguish between the duty imposed on a pedestrian crossing at a crosswalk and one crossing between intersections.

5. The trial Court erred in instructing the jury on the issue of an "unavoidable accident".

6. The trial Court erred in omitting the element of causation in its charge on contributory negligence constituting a bar to recovery.

SUMMARY OF ARGUMENT

This appeal involves questions concerning error committed by the trial Court arising out of an action instituted by the appellant, Louis Kuzminsky, for injuries suffered by him (while a pedestrian) as a result of an accident in which he was struck by a vehicle owned and operated by the appellee, Leroy Woodard.

Appellant contends that the trial Court erred in granting a Motion for Directed Verdict under Rule 50 after the jury was unable to agree and was discharged. Appellant urges this was error, inter alia, since appellant stated he was struck while a pedestrian in a crosswalk and the Court's opinion, in effect, found as a matter of law that he walked into the side of the defendant's vehicle. The granting of the Motion for Directed Verdict is the primary issue.

Assuming that this was error, the appellant also urges that since a new trial should be granted and various instructions and errors would again be involved, this Court should pass on further errors committed by the trial Court. These include failing to instruct on the "last clear chance" doctrine; failing to instruct properly on the duties and responsibilities of drivers at intersections; failing to instruct on the driver's duty to give full time and attention; failing to instruct when it is negligence to strike

a pedestrian; failing to instruct on the obligation of a driver to stop or turn aside his vehicle; failing to instruct on the driver's duty to yield the right of way, the driver's duty to proceed at a reasonable speed and keep a proper lookout and sound horn; failing to admit traffic regulations relating to, or substantially similar to, such instructions; error in granting instructions submitted by defendant which erroneously failed to distinguish between the duty of a pedestrian using a crosswalk and one crossing between intersections; error in granting an instruction on "unavoidable accident" and failing to give a proper instruction as to when the plaintiff is barred from recovery.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING APPELLEE'S MOTION FOR DIRECTED VERDICT

The trial Court's Memorandum Opinion is set forth at J. A. 11, 12. In it the court's view, simply stated, is that the plaintiff's version of the facts is inherently incredible, that the accident could not have happened as he stated it and that the "only inference which can be reasonably drawn is that the plaintiff stepped into the side of the defendant's passing automobile." (J. A. 11)

Two principles of law in this regard are significant: (1) To justify the Court's action in disregarding plaintiff's case, in effect, as incredible, "the undisputed physical facts must demonstrate that the

evidence is false beyond a reasonable doubt". See York Motor Express Co. v. Abbott, 195 Md. 525, 74 A.2d 12,16.(2) Incontrovertible physical facts are never established by oral evidence as to the position or speed of movable objects. Meek v. Miller D.C. Pa., 38 F. Supp. 10.

The case at bar involved the position or speed of movable objects, a vehicle and a pedestrian. The trial Court chose to find the incontrovertible physical facts as a matter of law, based solely on oral testimony. This is not only in violation of the above stated rule, but it also accepts as final that testimony which is at best unmathematical and which the plaintiff did not intend it to be nor did he testify as to as precise ---for example, what portion of defendant's vehicle struck him or what he felt. (J.A. 30,31).

A summary of the appellant's case shows the error of the trial Court's view.

Appellant testified substantially as follows: that he was fifty-seven years of age on the date in question; that he was struck by appellee's vehicle while in a crosswalk at the intersection of Otis Place and Georgia Avenue Northwest in Washington, D. C. on August 11, 1958 at about 7:00 a.m.; that prior to entering the marked crosswalk where he was "supposed to cross Georgia Avenue", he looked both ways before leaving the west curb; that he observed no traffic and started to cross Georgia Avenue, walking in an easterly direction from the west curb; that he took seven

or eight steps from the west curb and saw a car to his right coming "pretty fast" from the south on Georgia Avenue, going north, and believing that he would not be able to cross the street without getting hit by this car coming from his right, he stopped and waited for the car to go by, remaining in the crosswalk in a line with a point just inside the streetcar platform; that while in the crosswalk, he looked to see if it was safe to proceed, and just as he moved his head to look to the left, he was hit by appellee's car coming from the left; that the point at which he watched for the northbound car (the one to his right) to pass was a point in the marked crosswalk which he stated was about 17 inches from the car track in front of him and four or five inches from an imaginary line drawn from the streetcar platform through the crosswalk; that he did not know what part of the automobile hit his head but it could have been a windshield or a side view mirror; that he felt he had been "hooked" but he did not know what part of the vehicle hit his leg, although he believed it was the bumper and might even have been the back bumper. (J. A. 26, 27, 28, 29, 30, 31, 32, 48). He stated that the street car platform was about 90 feet long and that he was never on it. (J. A. 28, 29). Mr. Tittlebaum, a witness, testified that he saw appellant standing in the crosswalk for what "must have been a couple seconds" (J. A. 35),and that before he was hit, Mr. Kuzminsky was standing in the crosswalk "beside the loading platform" (J. A. 36). The appellee, Leroy Woodard, stated that he first

saw appellant as he approached the northern end of the platform; that, at that time, appellant was on the southern tip of the platform at a point where it declined slightly; that he drove directly on the streetcar rails at about 20 miles per hour and that the first time he knew he struck appellant was when he saw him in his rear view mirror lying on the ground although as he passed appellant he felt a "brushing effect". (J. A. 39-47).

It is on the basis of this testimony that the Court disregarded the facts stated in appellant's case and granted the Motion for a Directed Verdict after the jury was discharged for being unable to reach a verdict.

Such ruling was made in the face of the axiomatic principle --- and the factual foundation for the argument on this appeal --- that on a Motion for a Directed Verdict, the evidence must be considered in the light most favorable to the party against whom the directed verdict is asked, any conflict in the evidence must be resolved in his favor, and every conclusion or inference that can be legitimately drawn therefrom in his behalf must be drawn. Shewmaker v. Capital Transit Co., 79 U. S. App. D. C. 102, 143 F. 2d 142, Higashi v. Shifflett, 90 U. S. App. D. C. 302, 195 F. 2d 784.

Wholly apart from what has been said heretofore as to the propriety of disregarding the facts testified to as part of the plaintiff-appellant's case, the principles set forth in other like cases show the error of the Court's opinion.

The facts of Richardson v. Gregory, 108 U. S. App. D. C. 263, 281 F. 2d 626 are similar to the version stated at bar by the defendant. There, as here, it was urged that the plaintiff was on the streetcar platform and fell or stepped into the defendant's vehicle. The Court reversed, holding that the application of the principle of the "last clear chance doctrine" was for the jury.

Schear v. Ludwig, 79 U. S. App. D. C. 95, 143 F. 2d 20 involved a pedestrian who was struck by the defendant while crossing in the crosswalk. She did not see the vehicle. The defendant there, as the defendant here, urged that the plaintiff "walked into the side of the automobile". Id., p. 96. The Court pointed out that the street was clear, just as the facts at bar; that Mrs. Schear was apparently looking down continuously as she crossed the street, much as the jury might have found that Mr. Kuzminsky was looking to his right oblivious to the defendant driving toward him from the left. The Court in Schear v. Ludwig held that defendant's liability was a factual question and that it was reversible error to refuse an instruction on the doctrine of "last clear chance".

Similar factual situations of pedestrians struck in crosswalks can be found in other authorities and each declares that facts such as those at bar raise a jury question on the issue of liability. See Green v. Tingle, 1961, ____ R.I. ____, 169 A. 2d 373, 375, Rearg. Den. 169 A. 2d, 908. Cf. Eichstadt v. Underwood, 1960, ____ Ky ____, 337 S.W. 2d 684, 686; Likens Drug Co. v. Bosley, ____ Ky ____, 343 S.W. 2d 841; Bartlett v. Melzo, 351

Mich. 177, 88 N. W. 2d 518; Buie v Beamsley 171 Neb. 181, 105 N. W. 2d 738; 5 Am. Jur Automobiles and Highway Traffic, Sec. 458.

It is not insignificant that no local case appears to deprive a plaintiff who was struck while using a crosswalk, of a jury trial on the issue of liability. See Griffith v. Slaybaugh, 58 App. D.C. 237, 29 F.2d 437; American Ice v. Moorehead, 62 App. D.C. 266, 66 F. 2d 792;Cf. Terminal Taxicab v. Blum , 54 App. D.C. 357, 298 Fed. 679 and Steger v. Cameron, 71 App. D.C. 202, 204, para. 4; 109 F. 2d 347.

It might be noted that the defendant urged ~~at trial~~ that plaintiff was not using the crosswalk for crossing purposes since he allegedly stood to wait for traffic to pass.. It would seem strange indeed to suggest that in order to preserve his right of way in a crosswalk, a pedestrian must blindly move on,whether he be in the path of oncoming vehicles or not. At the very least, the short answer to this position was stated by the trial Court to be this: It is a jury question as to the use made of the crosswalk. (J.A. 55).

This is not all.

The trial Court's Memorandum Opinion further fails to consider the application of the principle set forth in Conlon v. Tennant, 110 U.S. App. D.C. 140, 289 F. 2d 881, recently decided by this Court.

There the Court noted that the question of liability or the sufficiency of the evidence is not necessarily determined solely by the plaintiff's version of the facts. There may be a "combination of two", a "synthesis" which presents a

"last clear chance" situation. Id., p. 142.

Let us synthesize the testimony at bar. The jury could have found, as defendant states, that he first saw the plaintiff as his vehicle approached the northern portion of the streetcar platform; that, as Mr. Kuzminsky testified, he was in the crosswalk at that time and not less than 90 feet away, the streetcar platform being about 90 feet long; and that, as the witness, Mr. Tittlebaum, stated, Mr. Kuzminsky stood in the crosswalk for at least a couple of seconds before he was hit. Then, the jury, if it so wished, could have rejected all other oral testimony. It is plain that if the jury chose to accept that portion of defendant's testimony indicating that he first saw the plaintiff from the northern tip of the platform and was going 20 miles per hour at the time, and if it then chose to credit Mr. Kuzminsky's testimony that he was standing in the crosswalk at least 90 feet ahead, and if it further found from his testimony that the plaintiff was oblivious of the peril, then Mr. Woodard had, or should have had, ample time to stop, or veer away, or otherwise avoid the collision. Cf. Capital Transit v. Garcia, 90 App. D.C. 158, 194 F. 2d 162.

A more general rule might be stated. It can, or should, be fairly said that whenever a pedestrian is in a crosswalk, a driver's ". . . unexplained failure to yield the right of way would constitute negligence". Douglas v. Hoff 82 Cal. App 2d 82, 185 P. 2d 607, 608. Here, Mr. Woodard failed to yield the right of way under this general principle, no less than under Sec. 52a of the traffic regulations (J.A. 16, 17). His so-called "explanation" was no explanation at

all. It was a denial that the appellant was in the crosswalk and an assertion that he was standing on the streetcar platform (J.A. 42). Hence, the unexplained striking of a pedestrian in a crosswalk, as appears at bar, required the Court to deny the Motion.

Once again, this is not all. The principle has been well-established in this jurisdiction that violation of a traffic regulation is itself negligence. Richardson v. Gregory, 281 F.2d 626, 108 U. S. App. D.C. 263, 266.

The appellee at bar testified that when he first saw appellant he was standing on the streetcar platform, not in the crosswalk as appellant and witness Tittlebaum testified (J.A. 42). The jury could infer that if appellant were in fact in the crosswalk and appellee did not see him there, but instead claimed he was on the streetcar platform, then appellee Woodard was not giving "full time and attention to his driving" in violation of Sec. 99c of the traffic regulations (J.A. 24). Such a violation is, of course, negligence and whether that negligence was proximate cause of the accident must be resolved by the jury. See Richardson v. Gregory supra.

The end result of the trial Court's ruling at bar is this: As a matter of law, appellee violated no regulation; as a matter of law, his speed was reasonable; as a matter of law, he gave full time and attention to his driving; as a matter of law plaintiff did not have the right of way; as a matter of law, even if he had such a right, it was yielded; and, finally, no matter what errors the appellee committed, the appellant's version is so inherently incred-

ible that he must be disbelieved and his version disregarded because a portion of his testimony might be construed to suggest that he was contributorily negligent as a matter of law, and yet the "last clear chance" doctrine would not apply to those selected facts.

The appellant's position can be simply stated: The facts --- or any portion that the jury would choose to accept --- do not conclusively compel the inferences appearing in the trial Court's Opinion (J.A. 11,12). It is not insignificant that the trial Court's ruling falls back on an "inference" of what the plaintiff did. The jury could have, instead inferred any of the following: That appellee's car swerved, that it failed to hold the rails, that it overhung the platform or went over the declining portion of the platform, that appellee was not giving attention to his driving, that the plaintiff was closer to the rails than he testified (inferring this from Mr. Tittlebaum's testimony and the indisputable fact that the appellant was hit by the appelle's car or some appendage of it) or any other like inference it chose to accept. In sum, the jury might draw its inferences not merely from the plaintiff's testimony or the witness Tittlebaum or appellee Woodard, but from a combination or synthesis of any portion of any one or of all of their testimony. The indisputable fact is the striking of plaintiff. The only question is the position of the parties --- where the plaintiff and defendant were situated when the accident occurred.

By the plaintiff's testimony, by the testimony of a witness, by the defendant's testimony or by a synthesis of all or any portion of them, it was a jury question as to where, and thus how, the accident happened.

For the foregoing reasons, it is submitted that the trial Court erred in granting appellee's Motion and that the ruling appealed from should be reversed and a new trial granted.

II. THE TRIAL COURT ERRED IN REFUSING TO ADMIT CERTAIN TRAFFIC REGULATIONS IN EVIDENCE, ERRED IN THE DENIAL OR AMENDING OF APPELLANT'S INSTRUCTIONS RELATING TO THE LAST CLEAR CHANCE DOCTRINE, A DRIVER'S DUTY AT INTERSECTIONS, WHEN IT IS NEGLIGENCE TO STRIKE A PEDESTRIAN, THE PEDESTRIAN'S RIGHT OF WAY AND ERRED IN THE GRANTING OF CONFLICTING INSTRUCTIONS SUBMITTED BY THE DEFENDANT

In this portion of appellant's argument, it is assumed that this Court will accept appellant's previous contentions. Obviously, if the trial Court were right in granting defendant's Motion for Directed Verdict, then the error claimed in this section and all following sections would be of no significance. If, however, the trial Court erred and the matter must be retried, this Court should consider the errors claimed in the denial of instructions and all other errors claimed hereafter, because each will arise on any re-trial.

At the outset, appellant suggests that it is often the view of lawyers that when a litigant makes claim of multiple error, his position is of questionable validity on separate error. The tendency is to equate claimed multiplicity

of error with legally weak authority.

Appellant suggests, however, while this tendency is often true, it has no significance on this appeal.

a. Error in admitting in evidence certain traffic regulations in evidence.

The plaintiff offered certain traffic regulations in evidence (J.A. 52). They are sections 22a, 22c, 25, 30, 52, 54 and 99 (c) which are set forth in the record in plaintiff's proferred instructions number 3 rather than unnecessarily inserted separately (J.A. 15, 16, 17, 24).

In passing on the admissibility of these regulations, the trial Court candidly stated: "These traffic regulations always confuse me. I never know whether they apply or not". (J.A. 56).

It is submitted that, as stated in the foregoing section, both the full time and attention regulation (99c, J A 24), and that on speed (22a, J. A. 15). should have been admitted. The facts, synthesized or not, justified both.

b. Denial of Last Clear Chance Instruction.

The appellant submitted, and the trial Court denied, the last clear chance instruction (J.A. 14, 15 - instructions; J.A. 60, - denial). The cases previously cited in Section I (pp 10 through 18 supra) involve this principle. Thus, to avoid repetition they are incorporated herein. For the reasons already stated, this doctrine applies to facts of this case whether by acceptance of the plaintiff's version of the facts or by selective synthesis. Cf. Conlon v. Tennant,

supra p. 10, Grober v. Capital Transit (D.C. D.C.) 119 F. Supp. 100.

c. Denial of instructions relating to the rights of the pedestrian and duties of the driver was in error.

The Court denied plaintiff's instruction 5 (J.A. 17; denied by Court J.A. 62). This instruction is a direct quotation from the case of Griffith v. Slaybaugh 58 App. D.C. 237, 29 F.2d 437. It should have been granted.

Plaintiff's instructions 7 and 8 should have been granted for the same reason that the traffic regulations to which they refer are admissible. (J.A. 18, 19, 62, 63).

Plaintiff's instruction 9, 10, 11, 12, 13, 14, and 17 (J.A. 19-22) are valid and applicable statements of principles set forth in pertinent cases and as such, should have been granted. See Heffner v. Admiral Taxi Service, 196 Md. 465, 77 A. 2d 127, Henkelmann v. Metropolitan Life Ins. Co., 180 Md. 591, 26 A. 2d 418, Douglas v. Hoff, 82 Cal. App. 2d, 82, 185 P. 2d 608.

The defendant's instructions numbers 1, 2 and 5 (J.A. 23, 24) were granted by the Court. (J.A. 70).

These instructions are in error because they ignore and fail to recognize the difference between a pedestrian's rights at a crosswalk and his rights and duties at other times. The right of way held by a pedestrian in a crosswalk does not place upon him a "continuing" duty to look - - - a duty which exists only when he crosses between intersections and

not in the crosswalk itself. Cf. Eichstadt v. Underwood, ____Ky_____, 337 S.W. 2d, 684.

These instructions erroneously fail to make the crucial distinction between a pedestrian's rights while he is in a place he should be --- a crosswalk --- and his rights when he is where he may cross only under special conditions --- between intersections. Cf. Henkelmann v. Metropolitan Life Insurance Co. 180 Md 591, 26 A.2d 418.

III. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON UNAVOIDABLE ACCIDENT

Over objection of counsel, the trial Court granted what has become an instruction used in all cases --- the instruction on unavoidable accident. (J.A. 78, 79, 85).

This instruction should be granted only if there are some facts in evidence which show that the accident could have occurred without the negligence of one of the parties. See Kreh v. Trinkle, 1959, 185 Kan. 329, 343 P. 2d 213, 219.

The usual case will show the possible intervention of a third force or unforseeable act. No such fact appears at bar in any of the testimony. Merely because the granting of this standardized instruction is by now habitual in our trial Courts, does not render it proper. It is suggested that the trial Court again erred by granting such an instruction. Cf. Lloyd v. Yellow Cab Co., 220 Md. 488, 154 A. 2d 906 (1959).

IV. THE TRIAL COURT ERRONEOUSLY DENIED PLAINTIFF'S INSTRUCTION ON WHEN DEFENDANT COULD HAVE STOPPED.

The Court denied an instruction that the jury could find the defendant could have stopped his vehicle within the 90 feet from the point he first saw the plaintiff (J.A. 24). This was error. Even appellate courts will judicially notice the facts stated in this instruction. Cf. Moss v. Penn R.Co.(C.A. Ind.) 146 F.2d 673.

V. THE TRIAL COURT ERRED IN AMENDING PLAINTIFF'S INSTRUCTION ON A PEDESTRIAN'S RIGHT OF WAY.

Plaintiff's instruction number 1 related to a pedestrian's right of way (J.A. 14). The Court erroneously added the clause appearing in parenthesis over objection of counsel. This clause placed a duty of care upon plaintiff which confused the instruction and misstated its application. The right of way of a pedestrian in a crosswalk exists independently of contributory negligence, as appears in cases cited in Section I of this brief. That he may be barred from recovery for contributory negligence does not destroy the right. The instruction as amended by the Court is in error.

CONCLUSION

For the foregoing reasons, the appellant urges that the ruling and judgment of the Court below was erroneous and that appellant should be granted a new trial.

Respectfully submitted,

EDWARD L. GENN
GEORGE JACOBI
Colorado Building
Washington, D. C.
Attorneys for Appellant

By Counsel:

BROWN, GENN AND BROWN
Colorado Building
Washington, D. C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

LOUIS KUZMINSKY 5116 - 9th St. N.W. Washington, D C.	Plaintiff	Civil Action No. 2925-59
vs.		
LEROY WOODARD 824 Crittenden St.N.W. Washington, D.C.	Defendant	

COMPLAINT
(for injuries to pedestrian)

1. This Court has jurisdiction since the parties hereto are residents of the District of Columbia and the amount involved exceeds Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

2. On or about August 11, 1958, at or near Georgia Avenue and Otis Place, Northwest, in the District of Columbia, the plaintiff was a pedestrian lawfully within the crosswalk at such intersection when he was carelessly and negligently struck by a motor vehicle negligently operated by the defendant.

3. That, as a direct and proximate result of the aforesaid negligence and carelessness of the defendant, the plaintiff was violently thrown and hurled to the pavement, with great impact and severity, and sustained penetrating wounds at the right calf, injuries to the right knee, left temple and to both arms and legs, multiple contusions and abrasions and other severe injuries, all or some of which may be permanent in nature.

4. That, as a direct and proximate result of the aforesaid acts of the defendant, plaintiff suffered grave permanent injuries to his entire nervous system, and suffered great pain of body and mind, and was required to be hospitalized for extended periods of time, and to undergo extensive medical and therapeutic treatments, and incurred other great losses and damages, and was required to be absent from any gainful employment for extended and prolonged periods of time, to the grave detriment of plaintiff; and that the injuries sustained by plaintiff are of such gravity and permanence as to require future extended medical treatment expenditures and loss of gainful employment, all to his damage in the amount of Fifty Thousand Dollars ($50,000.00).

WHEREFORE, THE PREMISES CONSIDERED, plaintiff demands judgment against defendant in the sum of Fifty Thousand Dollars ($50,000.00) and the costs of this suit.

/s/ EDWARD L. GENN
Edward L. Genn
514 Colorado Building
Washington 5, D C.
ME 8-2027

and

/s/ HOWARD D. LEVINE
Howard D. Levine
Washington Building
Washington 5, D.C.

Attorneys for Plaintiff

JURY DEMAND

The plaintiff demands a jury trial of the issued herein.

Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS KUZMINSKY, Plaintiff	:	
vs.	:	Civil Action No. 2925-59
LEROY WOODARD, Defendant	:	

ANSWER

Now comes the defendant, LEROY WOODARD, by his attorneys, McInerney & McCarthy, and for answer to the complaint filed herein, states that he is not required to answer the allegations contained in Paragraph One (1); denies the allegations contained in Paragraph Two (2); has insufficient information upon which to form a belief regarding the allegations contained in Paragraphs Three (3) and Four (4) and denies the same; and for a

FIRST DEFENSE, states that the complaint fails to allege a cause of action either in law or in fact which would entitle the plaintiff to recover from this defendant; and for a

SECOND DEFENSE, states that the injuries and damages, if any, sustained by the plaintiff were the result of his sole or contributory negligence, which is a bar to his recovery in this action.

McINERNEY & McCARTHY
One Thousand Connecticut Avenue
Attorneys for the Defendant
By: /s/ WILBERT McINERNEY
Wilbert McInerney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS KUZMINSKY	:	
	:	
Plaintiff	:	
vs.	:	Civil Action
	:	No. 2925-59
LEROY WOODARD	:	
	:	
Defendant	:	

PLAINTIFF'S PRETRIAL STATEMENT

1. Occurrence. The plaintiff, LOUIS KUZMINSKY, was approximately fifty-seven years old and a painter on the date of the action in question. He was in the act of crossing Georgia Avenue at or near the intersection of Georgia Avenue and Otis Place, N.W., in Washington, D.C. when he was struck by a vehicle being negligently operated by the defendant LEROY WOODARD. The accident took place on or about August 11, 1958, at approximately 7:00 A.M.

2. Acts of Negligence. The acts of negligence of the defendant resulting in the injuries suffered by the plaintiff are as follows:

a) Driving at an unreasonable speed.

b) Failure to give full time and attention.

c) Failure to sound horn or give warning.

d) Failure to yield the right-of-way.

e) Negligence under the principles of the so-called "last clear chance" doctrine as enunciated in the District of Columbia.

f) Violation of pertinent traffic regulations including ¶13, 21,

22a, and 22c, 25, 30, 46d, 52 and 54.

3. Injuries. As a result of the negligence of the defendant the plaintiff was thrown to the ground and suffered a penetrating wound of the right calf, lacerations of the temple, sprain of the knee, multiple abrasions and arthritis of the right knee, contusions and laceration of the right calf, swelling and immobility, inability to walk, and permanent weakening and reduced use of the right leg. The injuries to the right leg of the plaintiff are permanent. The plaintiff also incurred great pain and suffering and some residual pain continues to this date and will continue permanently.

4. Special Damages. As a result of the negligence of the defendant, plaintiff incurred the following special damage loss:

Dr. Winik	$ 270.00
Dr. Ormandy	487.00
Washington Hospital Center	518.10
Steel Knee Cage	18.00
Prescriptions - Approx.	175.00
Cabs - for medical treatment- Approx.	100.00
Glasses & Clothing	40.00
Loss of Wages - Approx. (5 months inability to work and reduced ability to perform outside painting jobs)	3,000.00

In addition, there is an undetermined permanent loss of wage earning capacity due to the fact that the plaintiff cannot do certain jobs of work that he could formerly do as a painter.

5. Stipulations. Hospital, doctor and other bills marked

by the pretrial examiner. The pertinent traffic regulations referred to above may be admitted without formal proof.

BROWN, GENN and BROWN

By: /s/ EDWARD L. GENN

LEVINE AND JACOBI

By: /s/ HOWARD LEVINE

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

This is to certify that copy of the foregoing was mailed, postage prepaid, to Wilbert McInerney, McInerney & McCarthy, 1000 Connecticut Avenue, Washington, D C., attorney for defendant.

Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS KUZMINSKY	:	
	:	
Plaintiff	:	
vs.	:	Civil Action
	:	No. 2925 - 59
LEROY WOODARD	:	
	:	
Defendant	:	

PRETRIAL STATEMENT OF
DEFENDANT

The defendant admits that at the time and place alleged he was operating his automobile in a sou therly direction on Georgia Avenue in the southbound car tracks and parallel to the loading platform on the west side of Georgia Avenue. The plaintiff was standing on the loading platform and as the defendant was passing the platform at a reasonable speed and with due care and caution, the plaintiff stepped from the platform into the side of the automobile of the defendant.

STIPULATIONS

1. Photographs.

2. Traffic regulations.

/s/ WILBERT McINERNEY
Wilbert McInerney
One Thousand Connecticut Avenue
Attorney for Defendant

PRETRIAL ORDER

K UZMINSKY	:	
	:	
vs.	:	No. 2925-59
	:	January 13, 1961
WOODARD	:	

Action in tort for personal injuries.

THE PARTIES AGREE TO THE FOLLOWING STATEMENT OF FACTS:

On Aug. 11, 1958, at about 7:00 A.M., the P then about 57 yrs. of age and a painter was a pedestrian on Georgia Ave. at or near the intersection of Otis Pl. Wash. D.C. N.W. and was in a collision with a car owned and operated by D travelling in a southerly direction on Georgia Ave., it was daylight, cloudy, road dry.

P CLAIMS:

P claims he was travelling in the crosswalk from West to East at the intersection across Georgia Ave. when he was struck by the negl. and viol. of traffic regs. by the D. The P's specific claims as to negl. viol. of traffic regs., injuries and special damages are set out in the statement annexed hereto, incorporated herein, and made a part hereof and marked "A."

The P claims that his permanent loss of wage earning capacity is due to the fact that he is now substantially confined to do interior painting, whereas prior to the accident he was able to to do outside painting.

D CLAIMS:

D asserts that he was travelling in the southbound car tracks, parallel to the loading platform on the West side of Georgia Ave., that P was standing on the loading platform and as D was passing the platform at a reasonable speed and with due care and caution the P stepped on the platform into the side of the car of D, thereby being guilty of contri. negl. or solely responsible for the accident. D denies any negl. or viol. of traffic regulations, or that the doctrine of Last Clear Chance applies.

STIPULATIONS

The D has in his possession photos initialed by Examiner to which counsel for P can make no agreement.

The following may be introduced in evidence without formal proof subject to objections of materiality and relevancy: D.C. Traffic Regulations; P's exhibit initialed by Examiner marked P-1, P-2.

In addition, P has documents initialed by Examiner with respect to which counsel for D will make no agreement.

The parties agree to the mutual exchange of all medical reports of examining or treating physicians, now in hand, on or before Feb. 15, 1961, and a similar exchange of all such reports within 48 hours of the alert of this case for trial.

Counsel for P agrees to make the P available for the purpose of a physical examination by physician of D's choice, before, but not to interfere with, trial.

The parties agree to the mutual exchange in writing on or before Feb. 15, 1961, of the name and address of witnesses to the accident. to the circumstances surrounding same, and with reference to the nature and extent of injuries and damage.

The Examiner has requested counsel for D to appear at trial with the maximum amount of authority to settle this case which will be allowed him by his principal.

Attorneys:

/s/ E. GENN — E. Genn for Plaintiff

/s/ WILBERT McINERNEY — Wilbert McInerney for Defendant

Pretrial Examiner

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS KUZMINSKY,	:	
	:	
Plaintiff	:	
	:	
vs.	:	Civil Action
	:	No. 2925-59
LEROY WOODWARD,,	:	Filed May 22, 1961
	:	
Defendant	:	

MEMORANDUM OPINION

The Court, at the completion of plaintiff's evidence, took under advisement the defendant's motion for directed verdict, and in accord with the practice approved by the Court of Appeals submitted the case to the jury. The jury was unable to agree upon a verdict, and defense counsel has filed timely renewal of his motion for a directed verdict. Upon the basis of all of the evidence, the Court cannot say in what manner the defendant was negligent or how the accident happened. Accepting the plaintiff's version of the accident and his testimony as to the part of the defendant's car which struck him, the only inference which can be fairly drawn is that the plaintiff stepped into the side of the defendant's passing automobile. The plaintiff could not have been struck by the defendant's car if the plaintiff was standing where he said he was standing -- that is, immediately adjacent to the end of the loading zone and in the crosswalk. The plaintiff was not struck by the front of the defendant's car and testified that his contact with the defendant's car was possibly against the side of the windshield or a side rear-view mirror.

The plaintiff believed that the wound to his leg was incurred from some hooking of the leg by the rear bumper of the defendant's car.

There is no testimony from the Accident Investigation Unit, or from anyone else, as to exactly where or how the accident occurred. Under the circumstances, the Court is convinced that any jury hearing this evidence would have to rely on guess and conjecture in order to reach a verdict. The Court concludes that the Court must grant the defendant's motion for a directed verdict.

/s/ EDWARD A. TAMM
JUDGE

Dated: 5/22/61

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS KUZMINSKY	:	
	:	
Plaintiff	:	
	:	
vs.	:	Civil Action
	:	No. 2925-59
LEROY WOODARD	:	
	:	
Defendant	:	

NOTICE OF APPEAL

Notice is hereby given this 16th day of June, 1961, that LOUIS KUZMINSKY, the Plaintiff, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment and order of this Court entered and filed on May 22, 1961, granting the Defendant's Motion for a Directed Verdict and for judgment in favor of the Defendant, LEROY WOODARD, against the Plaintiff, LOUIS KUZMINSKY.

BROWN, GENN and BROWN

By: /s/ EDWARD L. GENN
Edward L. Genn
Attorney for Plaintiff
514 Colorado Building
Washington, D C.
MEtropolitan 8-2027

TO BE NOTIFIED:

Wilbert McInerney, Esquire
Attorney for Defendant
1000 Connecticut Avenue, N.W.
Washington, D.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS KUZMINSKY,	:	
	:	
Plaintiff	:	
	:	
vs.	:	Civil Action No. 2925-59
	:	
LEROY WOODARD,	:	
	:	
Defendant	:	

ORDER NUNC PRO TUNC GRANTING
JUDGMENT FOR DEFENDANT ON
MOTION FOR DIRECTED VERDICT

This cause having come on for hearing on defendant's Motion for Directed Verdict which was made at the conclusion of the evidence, and decision thereon having been reserved pursuant to Rule 50, and the Motion for Directed Verdict having been timely renewed after the jury was discharged, and it appearing to the Court that the Motion should be granted and therefore that on May 22nd, 1961 this Court filed a memorandum granting such Motion, and it further appearing that it was the intention of the Court that such Memorandum Opinion should have been a final adjudication in this proceeding, and it further appearing that no entry of final judgment was made upon the Court's Opinion, and it further appearing that Oral Motion has been made to enter an Order Nunc

Pro Tunc granting final judgment to the defendant on the Motion for Directed Verdict as of May 22, 1961, and it appearing that the parties hereto have consented to the same, it is this 3rd day of October, 1961

ORDERED, that the defendant's Motion for Directed Verdict and for Judgment pursuant to Rule 50 of the Federal Rules of Civil Procedure be and it hereby is granted as of May 22, 1961, nunc pro tunc, and it is further

ORDERED, that the entry of judgment for defendant shall take effect as of May 22, 1961, nunc pro tunc and the Clerk of the Court is directed to enter this final Judgment on the docket accordingly.

(S) EDWARD TAMM
JUDGE

CONSENT:

(S) _____
Edward L. Genn
Attorney for Plaintiff

(S) _____
Wilbert McInerney
Attorney for Defendant

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

KUZMINSKY v. WOODARD C.A. No. 2925-59

PLAINTIFF'S INSTRUCTION NO. 1

You are instructed that if you find that the Plaintiff Mr. Kuzminsky, was in the crosswalk at the time of the accident, (and exercising due care for his own safety) then you shall find that he had the right of way, that the obligation rests upon the drivers of automobiles such as the Defendant, Mr. Woodard, to wait until the crossing is clear and if you find that the Defendant failed to yield the right of way, then your verdict shall be for the Plaintiff, Mr. Kuzminsky, if this failure was the proximate cause of his injuries.

PLAINTIFF'S INSTRUCTION NO. 2

The rule of law upon which you were instructed to the effect that contributory negligence cars or prevents a recovery by the plaintiff, Mr. Kuzminsky, is subject to the exception which has become known as the doctrine of last clear chance.

I shall now instruct you on the doctrine of last clear chance.

If you find that the defendant, Mr. Woodard, was negligent and that the plaintiff, Mr. Kuzminsky, was also guilty of contributory negligence, you may still find in favor of the plaintiff, Mr. Kuzminsky, if you find that he was in a position of danger; that he was

oblivious or unaware of his danger; or that he was unable to extricate or get himself out of his danger; that the defendant, Mr. Woodard, was either actually aware of or should have been aware of Mr. Kuzminsky's danger and his obliviousness or inability to extricate himself from his peril; and that the defendant, after he knew or should have known of Mr. Kuzminsky's inextricable or oblivious danger had the opportunity or would have had the opportunity and means available to avoid the collision and failed to do so.

The doctrine of last clear chance, as it applies in the District of Columbia is even broader than its name. If you find Mr. Kuzminsky was oblivious or unaware of his danger, he can recover against the defendant, Mr. Woodard, even if he would have been able to avoid the accident if he knew of his danger, providing Mr. Woodard had the time and the means to avoid the accident after the negligence occurred.

PLAINTIFF'S INSTRUCTION NO. 3

You are instructed that there was in force in the District of Columbia at the time of this accident certain traffic regulations which are as follows:

> §22(a): No person shall drive a vehicle on a street of highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the street or highway in compliance with legal requirements and the duty of all persons to use due care.

§22(b): Where no special hazards exist that requires lower speed for compliance with (a) of this section, the speed of any vehicle not in excess of the limits specified in this section or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this section or established as hereinafter authorized shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful:

1. Twenty-five miles per hour unless otherwise designated by official signs.

§22(c): The driver of every vehicle shall, consistent with the requirements of (a), drive at an appropriate reduced speed when approaching and crossing an intersection, or .... when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

§25 (a): Upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;
2. When the right half of the roadway is closed to traffic while under construction or repair;
3. Upon a roadway divided into three marked lanes for traffic under the rules applicable thereon; or
4. Upon a roadway designated and signposted for one-way traffic.

§30 (a): No vehicle shall at any time be driven to the left side of the roadway under the following conditions:

1. When approaching the crest of a grade or upon a curve in the highway where the driver's view is obstructed within such distance as to create a hazard in the event another vehicle might approach from the opposite direction;
2. When approaching within 100 feet of or traversing any intersection or railroad grade crossing.

§52 (a): When traffic control signs are not in place or not in operation, the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is

approaching so closely from the oopsite half of the roadway as to be in danger.

§54: Notwithstanding the provisions of this Article, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary.

§99 (c): An operator shall, when operating a vehicle, give his full time and attention to the operation of the same.

You are instructed that the violation of any of these regulations is in and of itself negligence in that it is conclusive evidence of failure to exercise due care on the part of the defendant. However, in order for you to find for the plaintiff against the defendant, you must also find that the violation of these regulations was the proximate or direct cause of the plaintiff's injuries.

PLAINTIFF'S INSTRUCTION NO. 5

You are instructed that the duty and respon sibility imposed upon drivers of automobiles is measured by the possibilities of dangers attending their use upon the public highways. It is a vehicle of great weight, speed and power, in contact with which the pedestrian is helpless. It is but a rational rule which emphasizes the driver's duty of special vigilance at crossing points on city streets, where the right of passage is not only free and common to all, but in common and frequent use both by pedestrians and vehicles. While the duties of reasonable care for their own safety and that of others are imposed upon both pedestrian and driver,

the driver's comparative personal safety in case of collision with a pedestrian is not to be overlooked in measuring his duty to exercise commensurate care for the safety of others.

PLAINTIFF'S INSTRUCTION NO. 7

You are instructed that there was in force in the District of Columbia at the time of this accident, a traffic regulation which is in evidence and which is as follows:

> When traffic control signs are not in place or not in operation, the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedstrian is approaching so closely from the opposite half of the roadway as to be in danger.

You are instructed that this regulation imposes on the driver notice that pedestrians have the right to use and cross the street involved and that it is his duty to keep a lookout and take proper steps to avoid an accident. Therefore you are instructed that the violation of this regulation by the defendant constitutes negligence and your verdict shall be for the plaintiff if you find such a violation by the defendant and this violation was proximate cause of the plaintiff's injuries.

PLAINTIFF'S INSTRUCTION NO. 8

You are instructed that there was in force in the District of Columbia at the time of this accident, a certain traffic regulation which is as follows:

An operator shall, when operating a vehicle, give his full time and attention to the operation of the same.

You are instructed that the violation of this regulation by the defendant constitutes negligence and your verdict shall be for the plaintiff if you find such a violation by the defendant, and that this was proximate cause of the plaintiff's injuries.

PLAINTIFF'S PRAYER FOR INSTRUCTION NO. 9

You are instructed that it is the duty of an operator of a motor vehicle to have his car under such control at street intersections and crosswalks as to be able to stop at the shortest possible notice. Also, wherever the pedestrian is within a crosswalk, it is evidence of negligence to run down a pedestrian who does not suddenly change his course and who is in full view for a sufficiently long period of time to permit the driver to avoid striking him.

PLAINTIFF'S PRAYER FOR INSTRUCTION NO. 10

You are instructed that a person in charge of a motor vehicle approaching a street crossing, is bound to make reasonable use of his senses to prevent injury to pedestrians. If he sees, or by looking might have seen, a person in such crosswalk, he is bound to stop or turn aside his vehicle to avoid collision with that persona, and when he stops it should be for sufficient time to afford such person a proper and reasonable time to get out of the way of the vehicle.

PLAINTIFF'S PRAYER FOR INSTRUCTION NO. 11

You are instructed that a motor vehicle operator is under a duty to anticipate the presence of a pedestrian at a crosswalk and to control his vehicle so that no harm will result. This duty implies the exercise of a high degree of care at intersections, so that a car can be stopped at the slightest sign of danger.

PLAINTIFF'S PRAYER FOR INSTRUCTION NO. 12

You are instructed that it is the duty of a person in charge of a motor vehicle driving on a public street to look ahead and to see all persons, vehicles or other obstructions in the line of his vision, and in case of an accident he will be conclusively presumed to have seen what he should have seen and what he could have seen in the proper performance and discharge of this duty.

PLAINTIFF'S PRAYER FOR INSTRUCTION NO.13

You are instructed that it is the law that when traffic control signs are not in place or not in operation, the driver of a motor vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger.

At the time plaintiff was injured, he was upon a crosswalk if he was within the confines of that portion of the street which would be embraced within the boundaries of the lines of the sidewalk if continued across

the street.

And when a pedestrian and an automobile, moving in different directions, approach such a crossing at the same time or in such a manner that, if both continue their respective courses, there is danger of collision, then the pedestrian is entitled to first use the crossing, and it is the duty of the driver of the automobile to stop or to so reduce speed as to give such pedestrian a resonable opportunity to pass in safety, and to that end to have such automobile under such control as to enable him to do so.

PLAINTIFF'S PRAYER FOR INSTRUCTION NO. 14

You are instructed that it is the law that any person driving a motor vehicle on the streets shall drive the same at a careful and prudent speed not greater than nor less than is reasonable and proper, having due regard to the traffic, surface, and width of the highway, and of any other condition then existing.

If you find that the defendant, Mr. Woodard, did not drive his motor vehicle at and before the accident at a careful and prudent speed not greater than nor less than was reasonable and proper, having due regard to the traffic, surface and width of the street, and of any other conditions then existing, he would be guilty of negligence, and if you further find from the evidence that the negligence, if any, of defendant, Mr. Woodard, was the direct and proximate cause of the injuries to the plaintiff, Mr. Kuzminsky, then the defendant Mr. Woodard would be liable for such injuries and damages as were occasioned thereby, and the plaintiff, Mr. Kuzminsky, would be entitled to recover from defendant.

PLAINTIFF'S PRAYER FOR INSTRUCTION NO. 17

The Court further instructs the jury that if you believe from the evidence in this case that defendant, Mr. Woodard, the driver of the car inflicting the injuries, prior to and at the time of the collision, did not have his car under control so as to avoid striking any person or pedestrian in the street, or crossing the street in the crosswalk, or if the jury believe from the evidence that he was not keeping a proper lookout for pedestrians at such time, who might then be in said street, or crosswalk, or who might be crossing in the crosswalk, or if the jury believe from the evidence that he did not sound his horn or give a signal so that any pedestrian might be warned of his approach, who might then be in the crosswalk, and if the jury believe that as a result of his failure, if they believe from the evidence he did so fail to keep a proper lookout for pedestrians in the crosswalk, or to sound his horn, or to keep his car under control so as to avoid striking anyone or any pedestrian who might then be in the crosswalk, he ran into and against plaintiff, Mr. Kuzminsky, inflicting upon him injuries, then, in either of such failures, it is the duty of the jury to find for the plaintiff, Mr. Kuzminsky, and against the defendant, Mr. Woodard.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS KUZMINSKY, Plaintiff	:	
vs.	:	Civil Action No. 2925-59
LEROY WOODARD, Defendant	:	

DEFENDANT'S INSTRUCTION NO. 1

You are instructed that before attempting to cross a street that is being used for the traffic of motor vehicles, it is the pedestrian's duty to make reasonable observations to learn the traffic conditions confronting him; to look to that vicinity from which, were a vehicle approaching, it would immediately endanger his passage; and to try to make a sensible decision whether it is reasonably safe to attempt the crossing. What observations he should make, and what he should do for his own safety, while crossing the street, are matters which the law does not attempt to regulate in detail, except that it does place upon him the continuing duty to exercise ordinary care to avoid an accident.

DEFENDANT'S INSTRUCTION NO. 2

You are instructed that when a person is using, or is about to use, a street or highway either as a pedestrian or as the operator of a motor vehicle, he has a duty to make reasonable observations as to traffic and other conditions which confront him in order to protect himself and others while using the roadways. What observations he should make and what he

should do for his own safety are matters which the law does not attempt to regulate in detail, except that it does place upon him the continuing duty to exercise ordinary care to avoid an accident.

DEFENDANT'S INSTRUCTION NO. 5

Every person using a public highway must exercise ordinary care at all times to avoid colliding with other persons, who also are using the highway, and to avoid placing himself or others in danger; and while he may assume that others will exercise due care and obey the law, he may not, for that reason, fail to exercise ordinary caution.

Traffic Regulation Section 99(c)

> "(c) An operator shall, when operating a vehicle, give his full time and attention to the operation of the same."

PLAINTIFF'S INSTRUCTION NO. 15

The Court instructs you as follows: That an automobile with good brakes on a dry clear road may stop within 20 feet upon seeing a perilous situation when the vehicle is driven between 10 and 15 miles an hour; that such vehicle under such conditions can stop within 43 feet when the vehicle is driven at 20 miles per hour and that such a vehicle under such conditions may stop within 80 feet when traveling at 30 miles an hour.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOUIS KUZMINSKY,	)	
	)	
Plaintiff	)	
-vs-	)	Civil Action No. 2925-59
LEROY WOODARD,	)	
Defendant	)	

PROCEEDINGS

THE DEPUTY CLERK: The case of Kuzminsky versus Woodward, Civil Action No. 2925-59.

(Voir dire examination and opening statements by counsel for both sides, reported but not made a part of this record.)

* * *

THE COURT: You may proceed, Mr. Genn.

MR. GENN: Mr. Kuzminsky, please.

Thereupon,

LOUIS KUZMINSKY

called as a witness in his own behalf, having been first duly sworn, took the witness stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GENN:

Q Mr. Kuzminsky, would you speak up loudly enough so that all members of the jury may hear you.

A. Yes.

Q You will have to do better than that, sir.

Will you state your name?

A Louis Kuzminsky.

Q Where do you reside, sir?

A 5116 Ninth Street, Northwest.

Q For how long have you resided there?

A Eleven years.

Q What is your occupation, Mr. Kuzminsky?

A I am a painter.

Q For how long have you held that occupation?

A Thirty-five years.

Q How old are you, Mr. Kuzminsky?

A Sixty now.

Q Directing your attention to the period of August, 1958, did in that month an unusual event occur to you?

A I didn't hear that.

Q Did an unusual event occur in that month, to you?

A Yes, I was hit by a car.

Q When was that, sir?

A August 11, 1958.

Q At approximately what time, sir?

A About 7 o'clock.

Q Will you tell us, sir, what you did prior to this particular accident from the moment that you left your home?

A Well, I came down from where I lived to Georgia and Otis, and I parked my car on Otis Place and I walked back to Georgia Avenue; I walked to the crosswalk and I was where I was supposed to cross Georgia Avenue. I looked both ways. I didn't see any traffic and I started to cross. Then I took about 7 or 8 steps; I saw a car coming from the south side on Georgia Avenue and he was coming pretty fast, so I thought I wouldn't be able to cross the street without getting hit by him so I stopped over there where I was. I didn't proceed any further. I waited for him to get by.

As he came up to Otis Place and I saw he was going to pass me by, I wanted to turn my head to look on my side to see if there was any traffic coming down. As I started to turn my head, I was hit. That was all.

MR. GENN: With the Court's permission, I think it would simplify it for the jury if we could use the blackboard.

THE COURT: I doubt if it would simplify it, but you may use the blackboard if you desire.

BY MR. GENN:

Q Mr. Kuzminsky, would you be kind enough to draw Georgia Avenue and Otis - -

MR. GENN: Can we agree on this, Mr. McInerney, the general terrain?

MR. McINERNEY: There isn't anything to agree to. There isn't anything on the blackboard.

THE COURT: Why don't you draw the intersection in, Mr. Genn? Be generous in the size of the intersection so the end jurors will be able to discern it.

(Counsel complied.)

THE COURT: Are you going to put in a loading platform?

(Counsel complied.)

BY MR. GENN:

Q Now with reference to what appears on the board, Mr. Kuzminsky, could you come down and with the pointer trace the route? Where you parked your car, mark that with an "X" and then point out the route that you traveled.

A (At the board.) That will be towards Silver Spring, is that right?

Q That is right.

A I came down Georgia Avenue this way, parked my car about here (indicating).

Q Would you mark an "X" where you parked your car, sir?

A (Complied.)

Q Where did you walk after you parked your car?

A I parked my car and I walked back to the corner, walked to the crosswalk; stopped over here and I looked up and down the street, and I didn't see any traffic; I started to cross and I came out to about here (indicating) - -

MR. McINERNEY: I want that held right there on that spot.

BY MR. GENN:

Q Would you mark where you were, sir?

A Right over here. I came out to about here. I saw a car coming up this way (indicating). I knew I wouldn't be able to walk all the way across by the time he will get to me, so I stopped over here and I waited for him to come up to Otis Place. When he came up to about here (indicating), I wanted to turn and look to see if it was safe to proceed; and the minute I moved my head, I was hit on my face.

Q All right, sir. Now, this is the streetcar loading platform. Do you know the approximate length of this streetcar loading platform?

A About 90 feet.

Q So that the picture may be clear, how many lanes are there on Georgia Avenue at this particular point? How many lanes of traffic?

A There was four lanes of traffic.

Q Two going south and two north?

A Two south and two north, plus a place to pass on the side.

Q Your destination was what, sir? I mean as you were crossing the street.

A My destination was a lunch room over here (indicating); that is where I was going.

Q All right, sir.

(Witness resumed the stand.)

THE COURT: Go ahead, Mr. Genn.

BY MR. GENN:

Q Mr. Kuzminsky, after you were struck, did you have knowledge of people around or any of the surroundings?

A There was a crowd of people around me.

Q Would you speak up, sir?

A After I fell down, there were a lot of people around me.

Q What happened to ypu, if you know, from the moment that you struck the ground?

A I fell down to the ground. The car tore my leg and I fell down. That is all.

Q Were you at any time that day, sir, on the streetcar platform?

A I didn't go on the streetcar platform.

Q Now, you were then brought to the hospital, sir; is that right?

A That is right.

Q Which hospital was that?

A Washington Hospital Center.

Q For how long did you stay at the Washington Hospital Center?

A I stayed about three weeks there.

Q To go back for a moment, sir, so that the record will be clear on this point: Are there traffic signals at the intersection of Otis Place and Georgia Avenue at that crosswalk?

A. No, no traffic signals.

Q What was the condition of the weather that day?

A. It was a clear, sunny day.

Q Is the terrain flat before you reach Georgia and Otis coming down south? Is it flat, the road?

A Yes, pretty flat.

Q Is it straight?

A Yes.

Q Now, while you were at the Washington Hospital Center, do you know who treated you there, sir?

* * * *

CROSS EXAMINATION

BY MR. McINERNEY:

Q Mr. Kuzminsky, as you were testifying you pointed to your head on several occasions as the point of your body that was hit. Do you have a recollection of your head being hit by part of this automobile?

A Yes.

Q What part of the automobile hit your head?

A I wouldn't know what part of the automobile; I know I was hooked.

Q Were you standing at the time?

A Yes, I was standing.

Q Straight?

A Straight.

Q How tall are you, sir?

A Five foot ten.

Q You would be able to look over the hood of an automobile if you were standing looking at it, wouldn't you?

A Oh, yes.

Q And would it not be a fact, sir, that you were hit by the right side of the windshield on the car?

A By the right side of the windshield?

Q Yes.

A It could have been the windshield or anything of that sort. It could have been a side-view mirror.

Q Supposing there wasn't any side-view mirror on the car?

A I don't know whether there was or there wasn't, all I know is I was hit.

Q That is the first thing you knew, is that right?

A That is right.

Q Now, how was your leg injured?

A There was a hole in it.

Q I beg your pardon?

A There was a hole in my leg, right about here (indicating).

Q What part of the automobile injured your leg?

A I couldn't say what part. I believe it was the bumper.

Q Which one, the back or the front bumper?

A It could have been the back; I wouldn't know, sir.

A When you left the sidewalk, which would be on the west side, did you look to your left to see if any traffic was coming?

A I looked to the left before I stepped off the sidewalk.

Q Before you stepped off the curb, is that right?

A Before I stepped off the curb, yes.

Q How far up Georgia Avenue could you see?

A I can see up because the light at New Hampshire Avenue, I could see past that.

Q It is almost unlimited vision, isn't it?

A Well, not very much unlimited because you get involved there -- it goes like it is a hill or something.

Q Did you ever see any car traveling south on Georgia Avenue when you looked as you stood at the curb?

A No, I didn't see any car.

Q Was there any traffic at all coming south?

A. No.

Q Not having seen any traffic coming south, then you started to cross the street; is that right?

A That is right.

Q Now, what point in the street had you reached when you watched the traffic coming north on Georgia Avenue?

A I took about 7 or 8 steps.

Q Seven or 8 steps from what point?

A From the sidewalk.

A (Complied.) Where would the crosswalk be?

Q You want a crosswalk?

A Yes, that is where I was.

(Counsel drawing crosswalk on diagram.)

THE WITNESS: I was right over here (indicating).

THE COURT: Make your mark a little larger so everyone can see it.

(Witness complied.)

BY MR. McINERNEY:

Q While you are there then, Mr. Kuzminsky, if that was where you were standing and there was a line straight up, you would have been inside of the platform, wouldn't you?

A That is right.

Q About how far in in terms of feet?

A What do you mean? How many feet from where?

Q If the platform is four feet wide, how far from the inside of the platform were you in terms of feet ?

A Just about maybe four or five inches from the outside.

Q And you were standing there?

A Yes.

Q What is the distance between the platform and the first car track?

A I believe it is about a foot.

Q So that would make you about 17 inches from the first car track?

A From the car track.

THE COURT: You may return to the witness stand.

(Witness complied.)

MR. McINERNEY: I have no further questions, Your Honor.

THE COURT: Any further questions, Mr. Genn?

MR. GENN: No, Your Honor.

THE COURT: You may step down.

(The witness left the stand.)

THE COURT: We will take a short recess before you call your next witness, Mr. Genn.

You ladies and gentlemen of the jury should discuss the facts in the case with anyone, not even your associates on the jury during the Court's recess.

(Whereupon, at 11:45 a.m. a recess was taken.)

THE COURT: You may call your next witness, Mr. Genn.

MR. GENN: Mr. Tittlebaum, please.

Thereupon,

IRVING TITTLEBAUM

called as a witness on behalf of the plaintiff, having been first duly sworn, took the witness stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GENN:

Q Would you state your name please, in a loud voice, sir, so all the jurors can hear you?

A Irving Tittlebaum.

Q Where do you reside, Mr. Tittlebaum?

A 1306 Balfour Court, Maryland.

Q What is your employment, sir?

A I work at the Title Paint Company.

Q For how long have you worked there?

A Fifteen years.

Q Do you recall an occasion, sir, when Mr. Kuzminsky was injured in an automobile accident?

A Yes, sir.

Q Do you remember when that was?

A It was the early part of August in 1958.

Q Would you tell us, sir, what you observed about this accident?

A Well, I was on the way to work in the morning and I had stopped at the corner of Otis and Georgia Avenue - -

Q Approximately what time in the morning was this?

A It had to be close to 7 o'clock because that's when I opened the store. I stopped at the stop sign at Georgia and Otis to wait for traffic to clear and I noticed Mr. Kuzminsky across the street, waiting in the crosswalk and I turned my head to look for the traffic, and the next thing I knew when I turned back around, Mr. Kuzminsky was lying there on the ground.

Q With reference to Otis Place and Georgia Avenue, the position from which you saw Mr. Kuzminsky, was that on the east of Otis Place or on the west of Otis Place?

A It was on the west.

Q This is a rough sketch of the area involved. Would you come down and point out, sir, where the Title Paint Company is and the position from which you observed Mr. Kuzminsky?

A (Complied.) The store is located here (indicating).

Q Were you in the store at the time?

A No, I was on the way to the store.

Q All right. Where were you?

A I was stopped right here on this corner (indicating).

Q I am going to put a "T" here for Mr. Tittlebaum. (Complied) Is that east or west, sir?

A East.

Q Right at this point (indicating)?

A Yes.

Q Where did you see Mr. Kuzminsky?

A He was standing here on the crosswalk when I got to the stop sign.

Q All right. And the next time that you saw him, sir, he was where?

A I don't know exactly where, but I know he was lying here (indicating). I believe he was on the tracks but where I couldn't be sure. (Witness resumed the stand.)

Q Did you go to see him, sir?

A Yes, after I parked the truck near the store, I went back to see how he was. We called the ambulance and that was it.

A What is it that fixes it in your mind that he was in the crosswalk or that you even noticed him on that particular day?

A Well, he is a familiar face. He comes to the store once in a while and works for a contractor who comes to the store. When you see a familiar face, you look more than you would usually.

Q For how long had you known Mr. Kuzminsky before this occasion?

A About three or four years, at least.

MR. GENN: I have no further questions.

CROSS EXAMINATION

BY MR. McINERNEY:

Q Were you in an automobile or were you standing at the intersection?

A I was in the truck.

Q You were stopped with the truck facing west?

A Right.

Q Was there a stop sign?

A Yes.

Q Now, did you ever see an automobile coming south on Georgia Avenue?

A There were several cars coming down Georgia Avenue. There was a car coming up north too. That is what I had my eye on mostly.

Q Did you ever see the car that came in contact with Mr. Kuzminsky before the impact?

A Not clearly, no. I saw cars coming but I didn't take notice of it particularly.

Q Do you recall what the color of the car was?

A No, sir.

Q How long had you been looking at Mr. Kuzminsky standing there?

A It must have been a couple seconds.

Q How wide would you say the loading platform was?

A It has been removed since then, but it was a long one. I would say it was between 50 to 90 feet.

Q How wide?

A About three and a half feet.

Q Now then, take the side of the platform that is closest to the street-car track: How far back from that edge of the platform was Mr. Kuzminsky standing?

A I couldn't tell you that.

Q Well, you designated it up there with a pointer.

A I said he was in the crosswalk but how far he was from the platform, I couldn't tell you. I know that he was standing beside the loading platform.

Q All right. That's where he was standing, beside the loading platform. Take the width of the loading platform: How far in was he standing?

A I couldn't tell you that. I don't know.

Q Was he half way?

MR. GENN: He has already testified, if the Court please, he doesn't know.

THE COURT: The witness has said he doesn't know, Mr. McInerney.

BY MR. McINERNEY:

Q Is that a marked crosswalk?

A Yes.

THE COURT: Was it at that time, Mr. McInerney?

BY MR. McINERNEY:

Q Was it at that time?

A I don't know.

Q You never actually did see Mr. Kuzminsky struck with the car, did you?

A No, I was looking the other way.

Q You were looking south?

A Uh-huh.

Q Now, did you see an automobile traveling south on the car tracks just prior to the time of the impact?

A No.

MR. GENN: If the Court please, I believe he is testifying.

THE COURT: I believe the question is a proper one. The witness has answered, no.

BY MR. McINERNEY:

Q I will ask you whether or not, Mr. Tittlebaum, this is your signature on this statement?

A (Perusing document) Yes.

Q Do you remember signing that statement?

A It has been a long time ago. I must have signed it; it's my signature.

THE COURT: The question is, Do you remember signing it?

THE WITNESS: Let me read it over.

(Perusing document.) Yes.

BY MR. McINERNEY:

Q What is the date of it?

A February 24, 1960.

Q Do you remember stating in the statement, "I was driving west on Otis Place approaching the intersection of Georgia Avenue. I noticed Mr. Louis Kuzminsky standing in the crosswalk near the south end of the streetcar loading platform. At this time, I notice a car going south on Georgia Avenue in the streetcar tracks."

A There were several cars coming down.

Q But when you signed the statement, did you have in mind the car that came in contact with Mr. Kuzminsky?

Q That car that hit Mr. Kuzminsky --

THE COURT: Just answer the question. Is that the car you were talking about?

THE WITNESS: It must have been.

BY MR. McINERNEY:

Q You, then, did see the car coming south on the streetcar tracks, didn't you?

A I saw him a block away; not at the time of the impact.

Q You saw this car coming south a block away?

A Yes.

Q Was it on the streetcar tracks?

A Yes.

Q Did it continue on the streetcar tracks?

A It stopped on the streetcar tracks.

Q I beg your pardon?

A When it stopped, it stopped on the streetcar tracks.

Q When it was coming south, it was on the streetcar tracks, was it?

A Yes.

Q Did you ever see Mr. Kuzminsky look in that direction to see if anything was coming?

A I didn't notice that.

Q Which way was he looking?

A He was looking across the street towards the delicatessen, I imagine, but I am not sure which way he was looking when I saw him.

Q Did you see him looking to his right?

A I don't know; I can't recall that.

Q You were looking left and right yourself, weren't you?

A I was looking at the traffic more than I was looking at him.

Q Then if you were looking at the traffic more than you were at him, upon what do you base your recollection that he was in the crosswalk?

A Because when I looked at him, I saw he was standing right next to the loading zone.

Q Right next to it?

A That is right.

MR. McINERNEY: I have no further questions.

THE COURT: Mr. Genn, do you have any further questions?

MR. GENN: If the Court will indulge me one moment.

REDIRECT EXAMINATION

BY MR. GENN:

Q Mr. Tittlebaum, do you recall where the vehicle which struck Mr. Kuzminsky stopped, if you know?

A You mean how far?

Q Yes. How far from the crosswalk?

A I wouldn't know how far, but I know approximately where he stopped. It was in between the loading platform and the corner, somewhere in there.

MR. GENN: I have no further questions, Your Honor.

* * * *

LEROY L. WOODARD

called as an adverse witness by the plaintiff, having been first duly sworn, took the witness stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GENN:

Q Would you state your name, your address and your occupation, sir?

A Leroy L. Woodard, 824 Crittenden Street, Northwest, Washington, D.C. I am a plasterer.

Q For how long have you held that occupation, sir?

A About 17 years.

Q Now, sir, directing your attention to August 11, 1958, you recall, do you not, on that day being involved in an accident with the plaintiff in this case?

A. Yes.

Q That accident occurred at or near Georgia Avenue and Otis Place, is that correct?

A Yes.

Q Now, prior -- Incidentally, do you recall what time approximately the accident took place?

A Yes, it was approximately seven a.m.

Q Prior to seven a.m., where had you been?

A Prior to seven a.m., I was at home at 824 Crittenden Street, preparing to go to work.

Q Where were you going to work?

A Kenilworth Avenue and Eastern Avenue.

Q Is that in the Northeast section or Northwest?

A Northeast.

Q What was the route you took from your home?

A That would be west on Crittenden; let on Georgia Avenue; south on Georgia; from Georgia to Harvard Street, left; out Harvard to Michigan Avenue; out Michigan Avenue to Hamilton; out Hamilton to Twelvth Street; out Twelvth to New York Avenue; left on New York to the parkway, and out parkway.

Q That is the normal route that you took each morning at about this time?

A Yes.

Q So, if I understood you correctly, up to the point of impact that took place at Georgia and Otis, you were coming south down Georgia Avenue; is that correct?

A Correct.

Q Now, to fix that particular place with reference to the other streets that you have mentioned, is there an intersection of New Hampshire Avenue and Georgia Avenue north of this particular place?

A Yes.

Q. I speak of Georgia and Otis.

A Yes.

Q About how many blocks from there?

A A block and a half, approximately.

Q Is there a stop light between those two at that intersection?

A There is a stop light at New Hampshire and Georgia and recently there has been placed one at Quebec and Georgia Avenue.

Q Did you stop at New Hampshire and Georgia Avenue?

A I did.

Q And when the light turned green, you went forward?

A Correct.

Q Were there any other cars on the street, either in front or behind you, at the time you reached New Hampshire and Georgia Avenue?

A In front of me, as far as I can remember, there was no automobiles as far as my vision was.

Q Was your vision obstructed?

A No, I mean you can only see a certain distance in the street down Georgia Avenue. I am talking about the limitation.

To the rear, I don't recall whether there were any automobiles or not.

Q That block and a half you referred to to New Hampshire Avenue, could you estimate the distance in feet, roughly, approximately?

A Well, that is difficult but I will attempt to. I would estimate the distance from New Hampshire to Quebec, one city block; that distance could be in the neighborhood of maybe a hundred yards, say.

Q A hundred yards.

A I am estimating.

Q I understand.

A And a half a block, we will say fifty yards.

Q And that is to Quebec or to Otis?

A From New Hampshire to Otis, a block and a half.

Q Did you observe any cars just prior to your reaching Otis Place and Georgia Avenue? Did you observe any cars going in a northerly direction, coming from the south?

A No, I did not.

Q Now, when did you first observe Mr. Kuzminsky if you observed him at all?

A When I approached the northern end of the platform.

Q Would you say that you had reached the platform?

A When I approached it.

Q How far away were you, or was it just a matter of a few feet?

A A matter of a few feet.

Q Would you be kind enough to step down, sir, and put a circle where you first saw Mr. Kuzminsky, that is, at the position you were when you first saw him?

A (Complied.)

Q Where was Mr. Kuzminsky standing -- If you observed him at that point, where was he standing when you first noticed him in that position?

A He was standing on the platform.

Q Where on the platform?

A The southern tip.

Q The southern tip. Would you put a "K" for Kuzminsky as to where Mr. Kuzminsky was? We have an "X" from his previous testimony right here. (indicating). Would you put a "K" where Mr. Kuzminsky was when you first noticed him?

A This platform declines slightly right here on the end, on the tip, and he was approximately here (marking diagram).

Q I think it might be simpler if we use the larger scale for this particular point that Mr. McInerney drew on the other side of the board.

Would you put a "K" there as close to where the point at which he was standing as you recall it?

A (Witness marked an "X" on the blackboard.)

Q I am going to correct it, if you do not mind, to a "K" in accordance with the transcript. (Complied.)

Which direction was Mr. Kuzminsky facing?

A East.

Q Was he moving at the time you noticed him for the first time?

A No, he was just standing there.

Q Was his head turned in either direction or was he facing straight ahead?

A He was facing east.

Q Was he carrying anything with him?

A I don't recall whether he was carrying anything or not. I could not tell you.

Q Do you recall the type of clothes that he was wearing?

A No, I don't.

Q Now, at that particular moment, you stated that he was standing still, did he give any indication as you came down the streetcar platform that he was about to go off the platform?

A No.

Q Was he standing very steady?

A I don't know because of the fact that I had my attention focused ahead.

Q You were watching him, however, all the way down the streetcar platform, were you not?

A Yes, just out of the side of my periphery, you know; that is all. Not all of my attention was focussed on him.

Q Now, as you approached the streetcar platform, what was your speed?

A As I approached the platform, I was going approximately 22 miles an hour.

Q Did you look at your speedometer at that point?

A I looked at it before that.

Q How soon before that did you look at your speedometer?

A Oh, approximately at Quebec.

Q And you maintained the same speed as you approached the streetcar platform; is that correct?

A Yes.

Q When you reached the northern end of the streetcar platform, you were still going 22 miles an hour or thereabouts?

A I decreased my speed.

Q As you reached the northern end, were you still going 22 miles an hour?

A That is when I decreased my speed.

Q And to what speed did you decrease your vehicle?

A Approximately 20 miles an hour.

Q Now, you had, as I understood your testimony, you had Mr. Kuzminsky in your vision all the way down the streetcar platform; is that correct?

A In the periphery of my vision.

Q Do you recall, sir, at your deposition which was taken on Wednesday, January 20, 1960 - -

A Yes.

Q - -when certain questions were propounded to you to which you responded?

A Yes, sir.

Q Referring to page 15 of that deposition at the bottom of the page, the question propounded was: "Did you see him all during the time you were driving down the platform? Were you watching him each bit of the way?" Your answer was: "Yes, until I had passed him."

THE COURT: What is your question to the witness?

BY MR. GENN:

Q Do you recall so testifying?

A Yes.

MR. McINERNEY: Your Honor, I submit that that is the same

thing that he testified to on the witness stand.

THE COURT: I don't think this an impeaching question, Mr. Genn.

MR. GENN: If the Court please, I think he stated -- he qualified it by saying it was in the periphery. I think there is a good deal of difference.

THE COURT: Ask your next question.

BY MR. GENN:

Q Now, as you reached the point which was half way down the street-car platform, what did you observe Mr. Kuzminsky doing?

A He was standing there.

Q Standing still?

A Yes.

Q And as you reached a point three-quarters of the way down, was that the same situation?

A The same situation, sir.

Q When did you first become aware of the fact that your vehicle and Mr. Kuzminsky had collided?

A Approximately at the time I had reached Mr. Kuzminsky, I heard some sort of a brushing effect against the car.

Q Would you be good enough, sir, to go to the blackboard and make a mark as to where you felt the brushing effect? Would you mark an "A" there?

(The witness complied.)

BY MR. GENN:

Q Now, at that particular point, point "A" when you felt that brushing effect, how far away from the platform was the right side of your vehicle?

A I was on the car tracks. The car track is just about a foot away from the platform.

Q You mean that you were driving directly on the car tracks?

A Directly on the car tracks.

Q Now, after you felt this brushing effect, what did you do?

A I looked in my rear-view mirror and I saw Mr. Kuzminsky in the street.

Q Where in the street?

A Approximately at point "A". And I stopped the car and got out, and went back.

Q Now, when did you first commence applying your brakes after you felt the brushing effect?

A When I looked in my rear-view mirror. Realizing my attention was off driving, I commenced applying my brakes.

Q How far away from point "A" would you say you first started putting your brakes down, about how many feet?

A I couldn't answer that; I can't recall.

Q How many seconds after was it?

A I don't recall that either.

Q Would you be able to state whether it was more or less than a second?

MR. McINERNEY: I object, Your Honor. He has answered the question. He said he can't remember.

THE COURT: The objection is sustained.

BY MR. GENN:

Q How far away from point "A" did you bring your car to a halt?

A I would say at Otis on the west side of Georgia Avenue.

Q Would your make a mark "B" where this would be.

THE COURT: Otis Place is not indicated, as I understand that diagram, on that diagram.

MR. GENN: It is not, Your Honor.

This is the est side - -

MR. McINERNEY: If your Honor please, the diagram on the other side is more descriptive of the question.

MR. GENN: You are quite correct, Mr. McInerney.

BY MR. GENN:

Q Now, so that we can see them both with reference to each other, would you put the "A" back where you felt the brushing effect and a "B" where you came to rest.

(The witness complied.)

BY MR. GENN:

Q After you brought your car to a stop at point "B", did you leave it there and go out to see Mr. Kuzminsky?

A Yes.

Q In what condition did you find Mr. Kuzminsky at the time?

A There was a laceration on his forehead or on his temple, the side of his face; and that was all that saw right then and there. I saw he was hurt and I went over to make a telephone call to call the ambulance and the police.

Q Did he give any indication that he was in pain?

A No, not then; but when I came back from across the street, it seemed like he was in pain.

Q Could you estimate, sir, the distance between point "A" and point "B", that is, the point of the brushing effect and the point where your car came to a halt?

A No, I couldn't.

Q Now, at point "A", that is where you first felt the brushing effect according to your testimony, what was your speed?

A My speed was 20 miles an hour.

Q Are there any lights controlling that intersection at Otis Place and Georgia Avenue where the accident occurred?

A No.

Q Now, just in front of the streetcar platform, by that I mean south of it, there are marks of a crosswalk. Was there a marked crosswalk there at the time?

A I don't recall it.

Q Had you been past this area previously?

A Yes.

Q Did you ever notice previously people crossing at that intersection?

MR. McINERNEY: I object, Your Honor. That is immaterial.

THE COURT: Your objection is sustained.

MR. GENN: I have no further questions.

MR. McINERNEY: No questions, Your Honor.

THE COURT: You may step down.

(The witness left the stand.)

MR. GENN: I would like to put Mr. Kuzminsky on for a few moments to ask him with respect to whether the crosswalk was a marked crosswalk.

THE COURT: Can you stipulate to that fact?

MR. McINERNEY: Whether it was marked or whether it wasn't marked is immaterial as I see it, because the plaintiff put himself on the crosswalk and the defendant, testifying for the plaintiff, takes him out of crosswalk. So whether it's marked or isn't marked, that's their testimony.

MR. GENN: I think he should have no objection to testimony with respect to a marked crosswalk.

THE COURT: Very well, you may put the plaintiff back on the stand.

Thereupon,

LOUIS KUZMINSKY

was recalled to the witness stand, having been previously sworn, was examined further and testified as follows:

DIRECT EXAMINATION

BY MR. GENN:

Q Mr. Kuzminsky, you have previously testified about the point where this "X" is where you were at the time you were struck and you stated it was in a crosswalk. Was this crosswalk a marked crosswalk on that date, sir?

A It was marked.

* * * *

Thereupon,

IRVING W. WINIK

called as a witness on behalf of the plaintiff, having been first duly sworn, took the witness stand, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GENN:

Q Would you state your name, sir?

A Yes, sir. Irving W. Winik.

Q What is your occupation, sir.

A I am an internist, a physician speializing in internal medicine.

* * * *

Q Did there come a time, sir, in 1958 when you treated the plaintiff, Mr. Louis Kuzminsky, for certain complaints he had made?

A Yes.

Q Would you state, sir, what you found and what treatment you gave him?

A I saw this patient August the 11th, 1958 at the Washington Hospital Center in the emergency room where he had been brough following an accident.

At that time, he had a penetrating wound of the inner side of the right calf; a cut over the left temple which required three stitches; a sprain of the right knee; and multiple abrasions and contusions over his body.

I examined him at that time and immediately consulted with the surgeon, Doctor John Lyons, who was the retired Chief of Surgery at the hospital, concerning treatment of the leg injury and he advised that we treat it conservatively.

We admitted the patient to the hospital and an X-ray of the right knee was taken to rule out the existence of fracture and it was negative. There was no fracture present.

The patient remained in the hospital under treatment until the 29th of August. While in the hospital, he continued to have a great deal of pain, first generalized, then pain in the right knee. His right leg, which was the obvious injury at the time, was quite swollen and painful and because of it, we had to place him on anticoagulants to prevent further clotting of blood.

On the 18th, a week after admission, we were able to squeeze out of this open gash in his leg a large collection of blood clots, after which the leg felt much better.

He first got up out of bed on the 27th of August and two days later was sent home.

At the time he was sent home from the hospital, there was a large firm region of this wound on the inner side of the right calf which was tender and below this, there was considerable swelling of the leg all the way down to and including the ankle. The knee was painful and still somewhat swollen, showing the presence of fluid in it. We kept him on this anticoagulant treatment.

He came to the office for repeated examinations and blood checks until the 23rd of September. The knee continued to bother him. For that reason, I referred him to an orthopedist, Doctor Ormandy, and Doctor Ormandy has followed him for this condition since then.

* * * *

MOTION FOR DIRECTED VERDICT

MR. McINERNEY: If it please the Court, at this time on behalf of the defendant, I would like to make a motion for a directed verdict by the Court.

It is a case, if Your Honor please, which is about as completely devoid of any showing of the allegation of negligence on the part of the defendant as it would be possible to make. There isn't a single bit of evidence in this case to indicate that the defendant breached any duty which he owed to the plaintif. * * *

(Whereupon, counsel for both parties made arguments on the motion, reported but not made a part of this record.)

ORAL RULING OF THE COURT

THE COURT: I think the most efficient step that the Court can take in the interest of saving time in the future is to reserve action on your motion, Mr. McInerney, under Rule 50(b).

I will submit the issue to the jury and then act upon your motion. By doing this, we will have a complete record and if the matter is appealed, a retrial will not be necessary.

I reserve action on your motion.

MR. McINERNEY: I will stand on my motion, if Your Honor please.

THE COURT: Very well. You have no testimony?

MR. McINERNEY: I stand on my motion.

MR. GENN: I did want to clarify one point. You asked with respect to negligence. We also do rely on the pretrial statement indicating a violation of certain traffic regulations.

THE COURT: You have offered no traffic regulations.

MR. GENN: They were offered, if the Court please, without formal --

THE COURT: Don't argue with the Court. You have not offered any traffic regulations in evidence.

MR. GENN: I would like to move to reopen the case with no prejudice at this time. I thought it was stipulated in the pretrial statement.

THE COURT: The Court does not conduct trials upon a record in a pretrail statement, Mr. Genn. You have offered no traffic regulations in evidence.

MR. GENN: I will move to reopen the case, if the Court please.

THE COURT: Is there any objection?

MR. McINERNEY: I do object, if the Court please.

THE COURT: I think, again, the Court would be required by the appellate decisions to permit counsel to reopen his case. I will grant your motion.

What specific regulations do you want to offer in evidence?

MR. GENN: Section 22 (a) --

THE COURT: Just enumerate your regulations first.

MR. GENN: Sections 22(a); 22(c); 25; 30; 52; 54; and 99(c).

THE COURT: Do you have the regulations before you, Mr. McInerney?

MR. McINERNEY: I don't have them with me, Your Honor. In any event, I take the position generally that there is no evidence whatsoever in this case to support the violation of any traffic regulation.

THE COURT: I will made available my copy of the regulations. (Document handed to counsel.)

In addition to your general objection, you may desire to object specifically to some of the regulations.

The first section offered is 22(a).

MR. McINERNEY: The thing reads: "No person shall drive a vehicle on a street or highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the street or highway in compliance with legal requirements and the duty of all persons to use due care."

There is no evidence here of any violation of any such regulation.

THE COURT: How do you say that speed is an issue in this case, Mr. Genn?

MR. GENN: The question is whether he slowed down sufficiently. He testified he slowed down to 20 miles an hour. The jury is entitled to decide whether that was under the given circumstances of this case a reasonable and prudent speed.

THE COURT: I don't see how speed is an element in the case. There is no question of retrieving or anything of that kind. I don't follow your reasoning in saying that speed is material.

How is the speed whether it was 30 miles an hour or 10 miles an hour, how is it an element in the case?

MR. GENN: It is an element to determine whether or not he drove in such a way as could have avoided or could not have avoided the accident. If his speed were 60 miles an hour, he might not have avoided the accident and the jury is entitled to determine whether or not under these circumstances 20 miles an hour, according to his testimony, was a proper speed. They don't even have to believe that.

THE COURT: You still haven't told me how speed contributed to the accident. That's what I don't understand.

MR. GENN: The failure to avoid it.

THE COURT: I will deny the admission of Section 22(a).

The next section is 22(c), Mr. McInerney.

MR. McINERNEY: Your Honor 22(c) says: "The driver of every vehicle shall, consistent with the requirements of (a), drive at an appropriate reduced speed when approaching and crossing an intersection or railway grade crossing, when approaching and going around a curve, when approaching a hill crest, when traveling upon any narrow or winding roadway, and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions."

Now, there is none of the elements here with the possible exception of reducing the speed as he entered the intersection, and he did that.

THE COURT: What is the phraseology about pedestrians near the last.

MR. McINERNEY: "and when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions."

There is no special hazard here with respect to the pedestrian.

MR. GENN: If he is attentive, I suggest it would be a hazard on their theory of the case.. I don't suggest all of that because of the railroad grade crossing is clearly not involved here.

THE COURT: I don't think it is necessary to comment on that.

I do believe that Section 22(c) may be relevant, Mr. McInerney, to a situation in which a driver observes a pedestrian standing on a loading platform.

I will admit Section 22(c) insofar as it relates to pedestrians.

* * * *

THE COURT: The next section of the traffic regulations offered in evidence is Section 52. Do you have any objection to this section, Mr. McInerney?

MR. GENN: I meant 52(a), Your Honor.

THE COURT: Very well.

MR. McINERNEY: It says: "When traffic control signs are not in place or not in operation, the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a cross walk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger."

That goes back, basically, to what my position has been throughout here: that he is not using the crosswalk to to cross. In other words, he's not going right on across. He is stopped at the southern end of the loading platform. According to his own testimony, he was waiting for a car from his right to come a block and a half up the street. In other words, he didn't exercise his right to cross. I don't think it is applicable where a man comes into a crosswalk and stands there. In other words, if that were the case, every automobile operator in the city would have to stop if he saw anyone standing in a crosswalk.

I submit this is not applicable, Your Honor.

MR. GENN: That isn't his testimony. He said he was going to cross the street. Now, he wasn't required to keep walking while he might get hit by a car coming in the other direction. He could wait for that car and in waiting for that car, he was using the roadway. I just don't see the point. The man has testified where he was going.

THE COURT: I think there is a question of fact whether the crosswalk was in fact used as a crosswalk or whether the plaintiff was using the loading platform as a safety zone.

I will admit this section in evidence. I will permit you to argue the point to the jury that the plaintiff was not using the crosswalk as a crosswalk, Mr. McInerney.

The next section is Section 54.

MR. McINERNEY: Section 54 says: "Notwithstanding the provisions of this Article and of Article III, Section 11, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a raodway."

THE COURT: What is the first phraseology again?

MR. McINERNEY: "Notwithstanding the provisions of this Article and of Article III, Section 11, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution upon observing any child or any confused or incapacitated person upon a roadway."

There is no evidence here that he didn't exercise due care. There is no evidence at all of any negligence.

MR. GENN: Your Honor has ruled as to the facts on that, at least you have reserved your decision. So, I think that is a question of fact

that is involved for the jury to decide whether he did use due care to avoid an accident. I think it is just a question for the jury to decide this issue. That is all. He testified that he felt a blurr and he kept going, that's all.

THE COURT: There is no testimony about any blurr in the case.

MR. GENN: A brushing effect. I am sorry.

THE COURT: These traffic regulations always confuse me. I never know whether they apply or not.

I will admit Section 54.

Is there any objection to 99(c), Mr. McInerney?

MR. McINERNEY: I am reasonably sure there will be.

"An operator shall, when operating a vehicle, give his full time and attention to the operation of the same."

There certainly is no evidence in this case that would indicate he wasn't giving his full time and attention.

THE COURT: What do you have in mind, Mr. Genn?

MR. GENN: Well, if the accident occurred as Mr. Kuzminsky said it did, obviously he was not giving his full time and attention.

THE COURT: How do you reach conclusion?

MR. GENN: Well, he made no effort to avoid the accident, to avoid striking him. If he saw him at the point that Mr. Kuzminsky puts himself, which was four or five inches -- we are talking about just a few inches -- and he struck him at that point --

THE COURT: He said four or five inches inside the platform, but the testimony is that the streetcar track was 12 inches from the edge of the platform; so the distance presumably from the point where he was standing to the streetcar track is 17 inches.

MR. GENN: Yes, but he said he was riding on the tracks,meaning that his wheel was on the track. There is an overhang over your wheel. Your wheel and the fender and the bumper extend beyond. Now, if Mr.

Kuzminsky was standing where he said he was standing and the jury believes that testimony, Mr. Woodard could not have been giving full time and attention to what he was doing because he would have avoided the accident. How else could he have hit him, if the jury accepts his testimony?

THE COURT: The Court will not answer your question at the present time.

MR. GENN: It was not intended to be directed to the Court.

THE COURT: Let me see this section again.

MR. McINERNEY: Thank you, Your Honor, for the use of it.

(Document handed to the Court.)

THE COURT: I will deny Section 99(c) on the ground that there is no evidence in the case relating to failure to give full time and attention.

The Court then, in order that the record will be clear, has admitted in evidence traffic regulations Section 22(c); 52(a) and 54.

Now, do you have prepared prayers to submit, Mr. Genn?

MR. GENN: Well, I would have to strike out some of this.

THE COURT: Do you have any prepared prayers, Mr. McInerney?

MR. McINERNEY: No, I do not, Your Honor.

MR. GENN: I have four proposed prayers, one of which includes the regulations which will have to be amended in accordance with Your Honor's ruling, with the understanding, of course, I reserve my objection to the Court's denial.

THE COURT: Will you submit your prayers.

MR. GENN: I will submit the prayers.

MR. McINERNEY: If Your Honor please, in view of the fact that the case was reopenedd for the purpose of admitting traffic regulations, I assume it is closed now. I will renew my motion which I made earlier.

THE COURT: The record will indicate the renewal of your motion.

(Counsel submitted prayers to the Court.)

THE COURT: I believe in view of the hour, gentlemen, I will give

you until tomorrow morning to consider these prayers. I will read them after we adjourn and I will pass upon them after hearing counsel in the morning.

MR. GENN: If the Court please, I have one or two others which are not quite ready. I would like to submit them tomorrow, if I may.

THE COURT: Very well.

(Whereupon, at 4:07 p.m., the trial in the above-entitled case was adjourned until 10:00 a.m., Wednesday, April 26, 1961.)

* * * *

Is there any objection, Mr. McInerney, to Plaintiff's requested instruction No. 1?

MR. McINERNEY: Your Honor, I will object to it on the same grounds that I mentioned yesterday when I made my motion, that is, that this plaintiff was not walking across the crosswalk at the time he was in the crosswalk, but on the contrary, he was standing in the crosswalk. And if he is standing in the crosswalk, there is no requirement in conformity with this prayer that the motorist could have avoided the impact.

This is more or less in the nature of not the degree of care which each should exercise for his own safety but attempts to place almost a legal obligation on the motorist to protect an indvidual who would be in the crosswalk under any circumstances.

THE COURT: What do you say to the objection?

MR. GENN: The facts testified show that he was in the crosswalk preparatory to crossing the street to meet a party who is his employer. Mr. McInerney may not agree that those are the facts, but those are the facts before the jury and the jury may believe them. That being the case, I think the instruction is proper.

However, I would like to amend the form just to make it a little clearer in the last sentence. It says, ". . .then your verdict shall be for

the plaintiff, Mr. Kuzminsky, if this failure" -- and I would like to insert the phrase, "on the part of the defendant" -- "was the proximate cause of his injuries." I think it makes a clearer statement.

THE COURT: The Court will grant this prayer with the amendment by inserting after the word "accident" in the second line, the phrase "and was exercising due care for his own safety."

MR. McINERNEY: Where is that, Your Honor?

THE COURT: That would be in the second line after the word "accident"; ". . .if you find that the plaintiff, Mr. Kuzminsky, was in the cross wallk at the time of the accident and was exercising due care for his own safety . . ."

I make that amendment because I think it then harmonizes the instruction with a later instruction to be considered which is offered by the defendant.

MR. GENN: I would like to note an objection to that, if the Court please.

THE COURT: Very well. Your objection is a matter of record.

Your prayer No 2, Mr. Genn, relates to last clear chance. You argued this at length yesterday. I don't think it is necessary to repeat anything more. Is there anything additional that you want to say about last clear chance?

MR. GENN: With reference to this, I have stated the cases Schear versus Ludwig and --

THE COURT: I said it is unnecessary to repeat anything or recite any case that you have previously cited. I ask if you have anything additional that you want to say?

MR. GENN: Yes. I think with reference to a case that I did cite but I want to make reference to facts in relation to that -- I don't believe that this was taken up. In Richardson versus Gregory, the statement of the defendant was that the party was on the platform. Now, in this

case, there is sufficient evidence for the jury to find that the defendant driver actually did strike the plaintiff on the platform.

The testimony of the plaintiff, as I recall, was that he was four or five inches behind the imaginary line that one would draw from the crosswalk. The defendant also testified that he was right at the corner of the platform. The jury would be entitled to infer from the facts that he was driving on the tracks and that the distance to the track from the platform was only one foot, that a portion of his vehicle came over the streetcar platfom, which would be, of course, again within that case as well as other cases I cited.

THE COURT: I don't think this case is a proper one for the application of the doctrine of last clear chance. I will deny Plaintiff's requested instruction No. 2.

MR. GENN: If the Court please --

THE COURT: The Court has denied the request prayer. We will pass on to the next prayer.

MR. GENN: If the Court please, I need to make a record. I wish to know whether it is form or the substance, that is all.

THE COURT: The Court has denied the application of the doctrine of last clear chance in this case.

I have two Plaintiff's requested instructions No. 3, Mr. Genn. I don't know which one you are submitting to the Court.

MR. GENN: There were some errors in respect to the first one submitted yesterday. I would like that one withdrawn and the second one submitted.

THE COURT: You will have to tell me which one is the first and which one is the second.

MR. GENN: I have placed a check mark on the one that is the one which I wish to submit to the Court and it has a typed in No. 3.

THE COURT: The Court has denied the admission in evidence of

traffic regulation No. 22(a). I will strike that out from the proposed prayer.

The Court has denied the admission in evidence of traffic regulation No. 25. I will strike that out of the prayer.

The Court has denied the admission in the evidence of traffic regulation No. 30.

The Court has denied the admission in evidence of Section 99(c).

Is there any objection, Mr. McInerney, to the prayer confining it to Sections 22(c), 52(a) and 54 of the traffic regulations which have been admitted in evidence?

MR. McINERNEY: Of course, Your Honor admitted them and I took a necessary objection to it yesterday, so I assume that would be in Your Honor's rulings now.

MR. GENN: I do wish to point out that there have been changes made in the particular instruction that were not involved yesterday.

THE COURT: The Court will grant this prayer with the omissions the Court has enumerated.

MR. GENN: I make the same objection, if the Court please, to thos portions - -

THE COURT: It is not necessary to make an objection to the Court's ruling on each of these prayers. The Court will afford you an opportunity to make a general objection which will blanket all of your requests, Mr. Genn.

Is there any objection to Plaintiff's requested instruction No. 4, Mr. McInerney?

MR. McINERNEY: That is the customary instruction with respect to damages and I would have to accept that one.

THE COURT: Very well. The Court will grant Plaintiff's requested instruction No. 4.

Is there any objection to Plaintiff's requested instruction No. 5?

MR. McINERNEY: Yes, Your Honor. That is nothing except a philosophical approach to the use of a motor vehicle on a highway. It tends to throw responsibility on the operator of a motor vehicle and none on the pedestrian. And it goes into the question of weight, speed and power and so forth like that. There is no evidence in here to support anything that might that rather philosophical approach to it. I do object to it, Your Honor.

THE COURT: What do you say to the objection, Mr. Genn?

MR. GENN: The statement is a direct statement verbatim from the case of Griffith versus Slathall. It points out not merely the general principle of law but does point to the jury's attention the comparative duties that the parties have in light of the circumstances in which they exist, that is, a vehicle against a pedestrian. It is a precise quotation and I believe it is proper.

THE COURT: It may be proper citation in a Court of Appeals opinion. I don't think it is a proper thing to use as a basis for an instruction to a jury. The Court will deny this requested instruction.

The Court ruled negatively on Plaintiff's requested instruction No. 6 as a matter of evidence. The Court will deny this requested instruction.

MR. GENN: If the Court please, that is a different one. That is the question of the speed a vehicle travels; it does not deal with stopping distances. That is mathematical, if the Court please.

THE COURT: I do not think the Court can take judicial notice of these facts. I will deny this request.

It seems to me that your requested instruction No. 7 is repetitious, is it not, of your instruction No. 3, Mr. Genn?

Why is the Court reading a traffic regulation a second time to the jury? In fact, this observation applies to both your requested prayers 7 and 8. They repeat virtually verbatim what is included in your prayer No. 3.

MR. GENN: I believe the phrase, however, "You are instructed that this regulation imposes on the driver notice that pedestrians have the right to use and cross the street involved and that is his duty to keep a lookout and take proper steps to avoid an accident." That does not appear in the previous instruction.

THE COURT: The Court will deny Plaintiff's requested instructions 7 and 8 on the ground that they are repetitious.

MR. McINERNEY: Not only are they repetitious, Your Honor, but 99(c) was denied and that is No. 8 instruction.

THE COURT: Very well.

Is there any objection to Plaintiff's requested prayer No. 9, Mr. McInerney?

MR. McINERNEY: I does not apply to the facts in the case. The position I take here is that any instruction has to have support in the evidence and not merely a general statement of law as to the control which he had. There is no evidence here that he didn't have any control and there is no evidence that the plaintiff suddenly changed his course; and he has testified that he saw the man standing on the loading platform. In other words, I don't think it is proper to just take a statement of the law and support it with other authorities and disregard the evidence in this particular case itself.

THE COURT: What do you say to the objection, Mr. Genn?

MR. GENN: There is evidence in this case from which the jury might find the facts stated in the first sentence.

THE COURT: What testimony is there of the plaintiff changing his course?

MR. GENN: It doesn't say that. It says, "whenever the pedestrian is within a crosswalk, it is evidence of negligence to run down a pedestrian who does not suddenly change his course and who is in full view for a sufficiently long period of time to permit the driver to avoid

striking him."

What is says is it is evidence of negligence if the plaintiff has not changed his course and he is in full view. I think Mr. McInerney simply misread the "not".

THE COURT: The Court will deny Plaintiff's requested instruction No. 9.

Is there any objection to Plaintiff's requested instruction No. 10, Mr. McInerney?

MR. McINERNEY: Yes, because I think it is attempting to impose upon the defendant in this case the duty that is not borne out by the evidence. There is no evidence here that he didn't use his senses, which is in line 3. He said he didn't see him in the crosswalk; he saw him on the loading platform.

These prayers, if Your Honor please, have the overall approach of a certainty that the pedestrian was in the crosswalk. Now the evidence that was produced by the plaintiff also shows that he was back on the platform. I object to it, Your Honor.

THE COURT: Mr. Genn.

MR. GENN: I will have to make a general statement now too and that is this: This is the defendant's testimony that Mr. McInerney refers to. Now, the jury is not required to believe the defendant. I have no disagreement with him as to general principles of law when he says they shouldn't be given absent facts. But the facts show here, according to Mr. Kuzminsky's testimony, that he was in the crosswalk. The jury may believe that if it so chooses. If here were in the crosswalk and the defendant testified that he saw him on the platform, he wasn't using his senses. It's just as simple as that. I think it is entirely up to the jury to make that determination.

THE COURT: I don't think the evidence justifies your requested prayer No. 10, Mr. Genn. The Court will deny it.

Is there any objection to Plaintiff's requested prayer No. 11, Mr. McInerney?

MR. McINERNEY: Yes, Your Honor, for the same reason. It is attempting to place the plaintiff in the crosswalk as an absolute requirement. There is nothing that I know of that indicates that motorists should anticipate the presence of a pedestrian in the crosswalk any more than he shouldn't anticipate it. There certainly isn't any high degree of care at intersections so that the car can be stopped at the slightest sign of danger. There is no evidence in this case of anything like that. I object to it, Your Honor.

THE COURT: Do you desire to be heard, Mr. Genn?

MR. GENN: I think the Court has already indicated it is going to deny it, so I will submit it.

THE COURT: The Court will deny Plaintiff's requested prayer No. 11.

Is there any objection to Plaintiff's requested instruction No. 12, Mr. McInerney?

MR. McINERNEY: Yes, Your Honor. In other words, what is appently done - -

THE COURT: Just a moment until I read the prayer.

(Short pause in proceedings.)

THE COURT: Very well. Go ahead.

MR. McINERNEY: If Your Honor pleases, this instruction here apparently is based on some form of a basic law to the effect that is he was looking, he should have seen that which could be seen. And in this case the evidence is he did look, he did use his sense and he did see the man when he was passing. I object, Your Honor.

MR. GENN: Not according to the plaintiff's testimony. On all questions, he keeps going back to what the defendant said. The question is could the jury believe on the plaintiff's testimony that he did not see

him. The jury certainly would be entitled to believe that from the testimony.

THE COURT: The only testimony on this point comes from the defendant who says that he saw the plaintiff from the side of his eye at all times. The Court will deny the prayer.

MR. McINERNEY: I object to No. 13, Your Honor.

THE Court: What is the grounds for your objection?

MR. McINERNEY: The first paragraph is a retatement of a traffic regulation which is back in No. 3. As to paragraph 2, it again goes on to emphasize the fact and to accept the fact that the pedestrian was in the crosswalk. This instruction here bears out the very thing that I have been talking about and that is that the testimony of the plaintiff and the testimony of the defendant, whether he be in the crosswalk or whether he be on the loading platform, is that he wasn't moving or walking but was standing still.

This is a case where a pedestrian is walking across and is entitled to his right-of-way. This man is standing still; he is not moving. I object, Your Honor.

THE COURT: Mr. Genn.

MR. GENN: Again that disagrees with the testimony of Mr. Kuzminsky that he was proceeding across the street.

THE COURT: The plaintiff has not testified that he was moving. I have waited to hear some testimony on that point. The testimony of the plaintiff was that he was standing at all times, Mr. Genn, at all times pertinent to the occurrence of the accident.

MR. GENN: He testified that his destination was across the street; that was the purpose of his transportation across the street. Now, at the time that this occurred, he may have been standing because he testified that he was looking to the right and as he turned to look to the left, he was hit at that particular moment but he has already given where

he was proceeding. He didn't say that he was going to take a streetcar, nor did he indicate anything that would suggest that he was camping in the middle of the block in that crosswalk.

I would like to say this: If there is serious objection to paragraph 2, I will withdraw paragraph 2. The testimony has been that it was a marked crosswalk and I think that is merely a descriptive situation which is not necessary. I will withdraw that portion of it, but there is evidence for the remaining part of that instruction and it is not the same as 52(a) because that dealt with the violation of regulations constituting negligence per se. This is not an issue of negligence per se.

THE COURT: The Court will deny the Plaintiff's requested prayer No. 13 on the ground that it does not conform with the evidence in the case.

Is there any objection of Plaintiff's requested prayer No. 14, Mr. McInerney?

MR. McINERNEY: I would say that that would be permitting the jury to speculate as to the speed. The testimony of pseed in this case is he was traveling south on Georgia Avenue at approximately 22 miles an hour and as he approached the intersection, he was going 20 miles an hour. There is no evidence in this case that that speed was the proximate cause of the accident or that it was excessive speed. I object to it, Your Honor.

MR. GENN: I have the same statement, I think the evidence supports this.

THE COURT: I don't understand yet, Mr. Genn, how you say speed is a factor in this accident. I have difficulty in understanding your position because I picture from the evidence the plaintiff standing still at the time of the accident. How, then, do you say that the defendant's speed is a factor in the accident?

MR. GENN: Well for one thing, again we go back to what I have

already said and Your Honor has not approved of it thus far so it is probably unnecessary repetition: I stated previously that I believe our Court of Appeals has adopted a principle of synthesis of the facts. By that I mean this: The testimony of Mr. Woodard is that he saw Mr. Kuzminsky on the streetcar platform at the northern end. There is testimony also by the plaintiff that was 90 feet away. The plaintiff testified that he was not on the streetcar platform but instead was in the crosswalk at the time.

Now, the facts are that if those are the facts and the jury chooses to believe those combinations of facts, then I submit he had a duty to slow down to such a speed and reduce to such a speed as would have been prudent, namely, a speed which would have permitted this party to cross or at least to have stopped in such a manner to have allowed him to pass.

THE COURT: Wouldn't the accident have occurred, upon the basis of the evidence before the Court, if the defendant had been going five miles an hour? In other words, how is speed a factor in the accident?

MR. GENN: I don't believe that is true at all. I believe that if he had come to a stop or had slowed down, that is not true at all. The testimony was that this party coming from the right had just passed and Mr. Kuzminsky was proceeding to turn to look to the left. The jury has a right to infer from the testimony that he was then going to proceed to cross the street.

Now, if a man goes five miles an hour, he goes seven and a half feet per second. If he goes seven and a half feet per second, from the point that Mr. Woodard saw him 90 feet away, it would take some ten seconds to come down that streetcar platform or more. So by that time he would have crossed the street. Therefore, had he gone five miles an hour, according to Your Honor's question, the accident would not have occurred.

THE COURT: The Court will deny Plaintiff's requested instruction No. 14.

The Court will deny Plaintiff's requested instruction No. 15.

The Court will deny Plaintiff's requested instruction No. 16.

I have two No. 16's, Mr. Genn. The prayer which the Court has denied relates to stopping within a distance of 90 feet.

I will mark as requested instruction No. 16-A a prayer which contains a citation to the case of Caughlin versus Layton at the bottom of the prayer.

Is there any objection, Mr. McInerney, to Plaintiff's instruction No. 16-A?

MR. McINERNEY: That seems to pretty much follow the instruction that I have asked for so I wouldn't object to that one.

THE COURT: I will grant this prayer.

Is there any objection to Plaintiff's requested instruction No. 17?

MR. McINERNEY: If Your Honor will indulge me a moment.

I object to that No. 17, Your Honor. That is a prayer that seems to be a gathering together of a lot of general principles of law asking the jury to consider certain things that are not in evidence at all. That has been my contention throughout, that you can't just say there was improper lookout unless there is some evidence. You can't go into the question of whether he had his car under control unless there is evidence that it isn't under control. The evidence in this case is that everything here, the defendant was doing but the plaintiff would wish to have the jury speculate that he didn't do it and I do object to it, Your Honor.

MR. GENN: I have the same statement. I believe that Mr. McInerney speaks of evidence but neglects the fact that the jury is entitled to draw inferences. That is their primary function.

THE COURT: The Court will deny Plaintiff's requested instruction No. 17.

MR. McINERNEY: The defendant, if Your Honor please, with-

draws his instruction No. 4.

MR. GENN: If the Court please, one inquiry I would like to make with reference to the standard instructions: I presume it will not be necessary to state those that I would like to have.

THE COURT: It is not necessary and the Court will afford you an opportunity at the end of its charge to request further charge and to note an objection to any charges given, Mr. Genn.

Is there any objection, Mr. Genn, to Defendant's requested instruction No. 1?

MR. GENN: Yes, there is an objection. There is no evidence that the plaintiff before attempting to cross the street he did make reasonable observations and so forth. He testified that he looked both ways, he went about 8 steps, waited for a car coming a block and a half away. This deals with when he leaves the curb. I think it is not applicable under the evidence.

MR. McINERNEY: Your Honor, I will stand on the prayer submitted and accept Your Honor's ruling on it.

THE COURT: The Court will grant the prayer.

Is there objection to Defendant's requested instruction No. 2, Mr. Genn, after you have had an opportunity to read it.

MR. GENN: The first paragraph is repetitious so far as I can see to No. 1. I object. Also then, with respect to the duty to look and testifies he looked but did not see, the evidence, I submit, would not support an instruction such as that or the finding at the time that he left the curb, that is, the time Mr. Kuzminsky left the curb, the car was in view. We are talking about many seconds later. There is no evidence to show that that car was in view at that time. New Hampshire Avenue is a block and a half away, and a car was coming a block and a half away. I submit the instruction is not supported by the evidence and is repetitious.

MR. McINERNEY: I will submit it, Your Honor.

THE COURT: I don't know that the second paragraph is applicable to the facts in this case, Mr. McInerney, because of the plaintiff's testimony that he had been standing for some time. I will strike the second paragraph and grant the first paragraph of the prayer.

Is there any objection to the defendant's requested instruction No. 3, Mr. Genn?

MR. GENN: That's the last clear chance doctrine. I have no objection to it with an addition - -

THE COURT: I don't believe that you are referring to the same prayer that the Court has as No. 3. From what I see in your hand, it looks much longer than the prayer that I have before me. The prayer I have before me as Defendant's requested instruction No. 3 says, "You are instructed with respect to the issue of negligence of a party in failing to yield a right-of-way, such right-of-way is not absolute."

MR. GENN: My Defendant's requested instruction No. 3 says - -

THE COURT: If you will find the one that I have referred to which says in substance that the right-of-way is not absolute and will you number that as No. 3.

MR. GENN: This is an erroneous instruction. It is taken from the standardized instruction book and does not conform with the law because that deals with the case of two automobiles on the question of right-of-way. The right-of-way of a pedestrian is of a different kind and nature. The instruction book, I believe, is incorrect in stating it this way. There is a case in the District of Columbia which states it accurately as to a pedestrian and an automobile situation. I don't think that you can apply the same situation between two automobiles. The question of a technical right-of-way is not involved with a pedestrian; it's a real right-of-way.

With respect to the question of not absolute, that has already been covered in the earlier instructions. As I have stated, a plaintiff

who is a pedestrian does not have a mere technical right-of-way.

THE COURT: What do you say to the objection, Mr. McInerney?

MR. McINERNEY: I will submit the prayer, Your Honor.

THE COURT: What do you say specifically to the statement that this prayer in the standardized jury instruction relates only to automobiles?

MR. McINERNEY: That is not my understanding of it, Your Honor. My understanding of it is it applies to a right-of-way. And so far as the right-of-way at a crosswalk is concerned, it is not an absolute right-of-way; it is a relative matter in which the pedestrian using the right-of-way has to exercise some degree of care for his own safety to avoid injury to himself. It would seem to me that if it was to be otherwise, a pedestrian could just blindly walk out into a crosswalk and be absolutely immune all the way over regardless of what he would do, if he didn't look or use his senses or anything.

THE COURT: Doesn't the standardized jury charge use the phrase "distance of the various vehicles" rather than "distance of the defendant's vehicle" as you have used it in this charge?

MR. McINERNEY: I will withdraw No. 3, Your Honor.

THE COURT: Very well.

Is there any objection, Mr. Genn, to Defendant's requested instruction No. 5?

MR. GENN: I presume I have the correct one. It starts off, "Every person using a public highway".

THE COURT: That is correct.

MR. GENN: I would object based upon the posture of this case, because it would appear to me to negate the question of the right-of-way. This instruction, which again I believe is in the standardized instructions, is referring to a situation where there has been no right-of-way or legal right given by the law but the relative rights of the parties separate

and distinct.

THE COURT: Doesn't this prayer state the rights and obligations of both parties?

MR. GENN: Not accurately because the rights are determined by the rights-of-way. In this particular case where a marked cross-walk is involved, not by a general principle applicable in the middle of the street or at any other portion. That is what this refers to.

THE COURT: I think this is an accurate statement of the law applicable to all situations. I will grant the prayer.

I think it would be well, Mr. Marshal, to put the lectern over in front of the reporter. (Marshal complied.)

MR. McINERNEY: While they are doing that, Your Honor, I assume you will define negligence, contributory negligence, burden of proof, mere happening of the accident is not sufficient to create liability.

THE COURT: That is part of Court's general charge.

* * * *

CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the jury, it is now the Court's responsibility to instruct you as to the law that will govern you in reaching your verdict in this case and it is, of course, your responsibility to accept the law as it is outlined to you by the Court.

The trial has been a relatively short one. The importance of the trial to the plaintiff and the defendant is not diminished in any degree by the relatively short time that it took us to try this case. In other words, this case is just as important to this plaintiff and to this defendant as would be any case in which they might be involved that might take weeks to try.

Remember when you go into the jury room that the closing arguments of the attorneys do not constitute evidence in the case. Remember also that the recollection of the attorneys as to the evidence

in the case is not binding upon you, for it is your recollection of the evidence which must guide you in reaching your verdict in the case.

If in the course of this rather brief charge to you upon the law which will govern you in reaching your verdict, I should have any occasion to make any reference to the evidence in the case, you are not bound by the Court's recollection of the evidence since, again I emphasize and underline, it is your recollection and your recollection alone which must govern you in reaching your verdict in the case.

It is your function, your responsibility to resolve the evidence and to arrive at the ultimate or the final facts and then to apply the law as it is given to you by the Court to those facts and thereafter to do justice between the parties.

In this regard, you must weigh the evidence which has been presented here in open Court without favor, without bias or without prejudice towards one side or the other.

As jurors you are the sole judges of the facts. It is up to you, from the testimony which you have heard, to determine what the facts are in this case. As jurors you are the sole judges of the credibility of the witnesses. This means that you must determine which of the witnesses you are going to believe and to what extent you are going to believe each of the witnesses.

In determing how much credence, how much credibility you will give to the testimony of each witness, you have the right to consider the demeanor of the witness on the witness stand, his manner of testifying, whether the witness impresses you as having an accurate memory and recollection of the facts about which he is testifying, whether the witness displays any favor or prejudice towards the plaintiff or the defendant, and I think most important of all whether the witness has any interest in the outcome of the case. You have a right to draw upon all the past experiences of your own lives in determining what factors you will utilize

in determining the credibility of the witnesses.

I think that each of ous, as we go through life, develop little tests by which we from day to day decide whether people are telling us the truth or only part of the truth and we apply those tests to all of the people with whom we come in contact. You have the right to apply to the testimony of these witnesses any tests or standards which your experience, your personal experience has taught you to be valuable in evaluating the credibility of a person to whom you are speaking.

If you believe that any witness willfully testified falsely as to any material fact concerning which that witness could not possibly be mistaken, you are then at liberty if you deem it desirable to do so to disregard the entire testimony of that witness or any part of the testimony of that witness.

There are relatively few witnesses in this case. I feel compelled, nevertheless, to caution you that you should not be influenced by the number of witnesses who have testified for one party or the other and to caution you that you should not disregard the testimony of any witness on an arbitrary basis.

You are instructed that the testimony of one witness entitled to full credit is sufficient to the proof of any fact and may justify a verdict even if a number of witnesses have testified to the contrary if upon the whole case and considering the credibility of the witnesses, as I have defined that term to you, you should find that the probability of truth in your estimation favors the testimony of that one witness.

In this regard, a word of caution about the testimony of the two doctors who testified as experts in the case: It is a general rule of evidence that a witness cannot express opinions from the witness stand. One of the very few exceptions to that rule is the exception of the testimony of expert witnesses. Expert witnesses are men or women who are educated or trained in a line of work in which the average layman

does not possess a broad knowledge. The doctors are expert witnesses. The Court permitted them, upon the basis of their expertise, to testify as to matters of opinion.

The point is that you are not bound to accept the testimony of an expert witness. You should not arbitrarily disregard the testimony of an expert witness. You should consider his training, his background, the impression that he makes on you from the witness stand, and you should give to his testimony such weight as in your judgment it is fairly entitled to receive.

It is your duty, your sole responsibility to resolve the conflicts of evidence in this case.

The burden of proof in this case, as it is in every civil case, is upon the plaintiff to sustain his aspects of the case by what we call a fair preponderance of the evidence.

What does this mean? The term "preponderance of the evidence" means such evidence as when weighed with that opposed to it has the more convincing force. It is my practice to tell juries that this term "preponderance of the evidence" lends itself better to example than to definition.

As an example of the practical operation of this term "preponderance of the evidence", imagine when go into the jury room that you have on the table before you an apothecary scale. An apothecary scale is a scale in which two trays hang suspended from a bar in such a manner that they hang in equal balance. Label the lefthand tray of the imaginary scale with plaintiff's tray. Label the righthand tray the defendant's tray. Place all the evidence in the case which favors the plaintiff's side of the case in the lefthand tray, and give to it the weight that you believe the evidence should receive. Place all the evidence in the case which favors the defendant's side of the case in the righthand tray, again giving the evidence such weight as you believe it should receive.

With all of the evidence sorted and placed in the two trays, if the lefthand tray goes down, that is, if the plaintiff's evidence outweighs the defendant's evidence, then your verdict should be for the plaintiff. On the other hand, if the righthand tray goes down, that is, if the defendant's evidence outweighs the plaintiff's evidence, then your verdict should be for the defendant because the plaintiff has not established his case by a preponderance of the evidence. And the third possible situation that might result with all of the evidence in the trays is if the trays with all of the evidence in them remained in equal balance. If you find the evidence in equal balance on the issue of negligence or proximate cause, then your verdict must be for the defendant because the plaintiff has not established his case by a preponderance of the evidence.

A party has succeeded in carrying the burden on an issue of fact if the evidence favoring his side of the question is more convincing than that tending to support the contrary side and if it causes you, the jurors, to believe that on that issue the probability of truth favors that party.

Remember, then, the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the injury to the plaintiff. If the plaintiff fulfills this burden, he is entitled to recover from the defendant.

The law does not permit you to guess or to speculate as to the cause of this accident. If the evidence is equally balanced on the issue of negligence or upon the issue of proximate cause so that it does not preponderate in favor of the person making the charge, that is, the plaintiff, then of course the plaintiff has failed to fulfill his burden of proof.

Now then, I have mentioned negligence so, naturally, the question comes to mind, What is the legal definition of "negligence"?

Negligence is the doing of some act which a reasonably prudent person would not do or the failure to do something which a reasonably

prudent person would do actuated by those considerations which ordinarily regulate the conduct of human affairs. Negligence is the failure to use ordinary care in the management of one's property or of one's person. Negligence, of course, is not an absolute term; it must be a relative one. The conduct in question, the conduct that you are considering in a particular case must be considered in the light of all of the circumstances in that case. Obviously, what is negligence under one set of circumstances or conditions might not be negligence under another set of conditions.

The standard, then, that th e law sets is the standard of the conduct of the ordinary prudent man under similar circumstances. The test of negligence is not the conduct of an extraordinarily cautious person, nor the conduct of an exceptionally gifted or exceptionally skillful person. The law does not demand that high a standard as a general standard of conduct; it requires on the part of all of us that standard of conduct which I have defined to you, namely, the care that a person of ordinary prudence exercises in the management of his own affairs in order to avoid injury to himself or to others. The amount of care or caution varies with the circumstances. It varies directly in proportion to the danger known to be involved in a particular situation.

A third definition is essential for your understanding at this point and that is a definition of the words "proximate cause". What is the proximate cause of an accident? The proximate cause of an accident or of an injury is that cause which in actual continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred.

In the law, however, we recognize what is termed an unavoidable or an inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided; they simply denote an accident that occurred without having been proximately caused by

negligence. Even if such an accident could have been avoided by the exercise of exceptional foresight, skill or caution, still no one may be held liable to injuries resulting from it.

Now then, both negligence and proximate cause as I have defined them to you are requisites for finding liability. The mere fact that an accident happened, considered alone, does not support an inference that any party to the accident was negligent. No presumption of negligence whatsoever arises from the mere happening of an accident. On the contrary, the legal presumption is that legal care was exercised by all of the parties.

The burden of proof, then, is upon the plaintiff to overcome this presumption of due care on the part of the defendant and prove by a preponderance of the evidence that the defendant was guilty of negligence and that this negligence was the proximate cause of the accident.

At this point we reach another term which you must consider in reaching your verdict in this case, and that is an element which the law defines as "contributory negligence". Contributory negligence is negligence on the part of the person injured, that is, on the part of the plaintiff which combined in some degree with the negligence of another helps in proximately causing the injury of which the plaintiff complains.

If you find that the plaintiff in this case, Louis Kuzminsky, was guilty of contributory negligence, in other words, if his negligence contributed in some manner or degree to the happening of the accident, you must find for the defendant because one who is guilty of contributory negligence may not recover from another for the injuries sustained.

You are instructed that if you find that the plaintiff, Mr. Kuzminsky, was in the crosswalk at the time of the accident and that he was exercising due care for his own safety, then you should find that he had the right-of-way; that the obligation rests upon the drivers of automobiles, such as the defendant Mr. Woodard, to wait until the crossing is clear.

If you find that the defdant failed under these conditions to yield the right-of-way, then your verdict should be for the plaintiff, Mr. Kuzminsky, if the failure on the part of the defendant was the proximate cause of the plaintiff's injuries.

The Court has admitted in evidence certain traffic regulations. I will read them to you.

The first one is that where no special hazard exists that requires lower speed for compliance with this section, the speed of any vehicle not in excess of the limits specified in this section or established as hereinafter authorized shall be lawful, but any speed in excess of the limits specified in this section or established as hereinafter authorized shall be prima facie evidence that the speed is not reasonable or prudent and that it is unlawful. The traffic regulation then prescribes that twenty-five miles an hour shall be the legal speed unless otherwise designated by official signs.

Another traffic regulation which the Court has admitted in evidence provides that the driver of every vechicle shall, consistent with the requirements of other sections of the statute, drive at an appropriate reduced speed when approaching and crossing an intersection, or when special hazard exists with respect to pedestrians or other traffic or by reason of weather or highway conditions.

The traffic regulations provide that when traffic control signs are not in place or not in operation, the driver of a vehicle shall yield the right-of-way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger.

The law further provides that, notwithstanding the provisions of the regulations, every driver of a vehicle shall exercise due care to

avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary.

You are instructed that the violation of any of these regulations is in and of itself negligence. However, in order for you to find for the plaintiff against the defendant, if you find there was a violation of any of these regulations, you must also find that this violation of these traffic regulations was the proximate or direct cause of the injury to the plaintiff.

Pedestrians crossing a street within a crosswalk are not bound to be continually on the lookout to avoid injury from motor vehicles. While they must be prudent themselves and use reasonable care for their own protection, they have the right to assume that automobile drivers will exercise a proper degree of care and will observe the traffic laws and ordinances.

You are instructed that before attempting to cross a street that is being used for traffic of motor vehicles, it is a pedestrian's duty to make reasonable observations to learn the traffic conditions confronting him, to look to that vicinity from which were a vehicle approaching it would immediately endanger his passage and totry to make a sensible decision as to whether it is reasonably safe to attempt to cross. What observations he should make and what he should do for his own safety while he is crossing the street are matters which the law does not attempt to regulate in detail, except that it does place upon the pedestrian the continuing duty to exercise ordinary care to avoid an accident.

Your are instructed that when a person is using, or is about to use, a street or highway either as a pedestrian or as the operator of a motor vehicle, he has the duty to make reasonable observations as to traffic and other conditions which confront him in order to protect himself and others while using the roadways. What observations he should make and what he should do for his own safety are matters which the law

does not attempt to regulate in detail, except that it does place upon him the continuing duty to exercise ordinary care to avoid an accident.

Every person using a public highway must exercise ordinary care at all times to avoid colliding with other persons, who also are using the highway, and to avoid placing himself or others in danger; and while he may assume that others will exercise due care and obey the law, he may not, for that reason, fail to exercise ordinary caution on his own behalf.

If, under the Court's instructions, you find that the plaintiff Louis Kuzminsky is entitled to a verdict, you will consider in fixing the amount of your award the elements of damage that I am about to mention: First, the reasonable value, not exceeding the cost to the plaintiff Louis Kuzminsky of examinations, tests, attention and care given by physicians and surgeons reasonably required and actually given in the treatment of this plaintiff, plus the reasonable value of any further treatment which you find from the evidence is reasonably certain to be required, if any. Second, the reasonable value, not exceeding the cost to the plaintiff Louis Kuzminsky of the services of nurses, attendants, hospital accomodations and care and ambulance services which were reasonably required and actually given in the treatment of Mr. Kuzminsky, and the reasonable value of such services which you find the evidence is reasonably certain to be required in the future.

If, under the Court's instructions, you find the plaintiff Louis Kuzminsky is entitled to a verdict, you will consider not only the elements of damage which I have previously enumerated but you will also award him such a sum as will reasonably compensate him for the pain, discomfort and mental anguish suffered by him which under the evidence you find was shown to have been suffered by him as a proximate result of the injury in question and for such pain, discomfort and mental anguish, if any, that you find from the evidence he is reasonably certain to suffer from in the future from the same cause.

Finally, if you find for the plaintiff, you will award to him the reasonable value of the time lost by him since his injury where in he has been unable to pursue his usual occupation. In determining this amount, you should consider the evidence of the plaintiff's earning capacity, his actual annual earnings and the manner in which he ordinarily occupied his time before the injury and find what he was reasonably certain to have earned in the time lost had he not been disabled.

If you find for the plaintiff, the amount of your verdict is left to your sound discretion but the award must be just and reasonable and must be based upon the evidence introduced.

The burden of proof is upon the plaintiff to prove all of the elements of his damages.

I have instructed you on the subject of the measure of damages in this action because it is my duty to instruct you as to all of the law that may become pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages. The fact that I have given them to you must not be interpreted as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

Your verdict, of course, must be a unanimous one which means, that all twelve of you must agree in it.

The Court has admitted a number of exhibits in evidence. You may have any or all of these exhibits in the jury room if you want to examine them. By merely asking the marshal who will be in attendance at the jury room door for the exhibits, they will be sent in to you.

If in the course of these instruction, any rule, direction or idea has been stated by me in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason, you should not single out any certain sentence or any individual point or in-

struction and ignore all of the others but you are to consider all of the instructions as a whole and to regard each in the light of all of others.

Now then, as a practical matter, how do you go about reaching a verdict in this case? It seems to me that you might well follow the procedure which I am about to outline to you: You should first ask yourselves a question, namely, Was the defendant guilty in this case? -- remembering the definition of negligence which I have given to you. If your answer to that question is no, then you find for the defendant. There is nothing more to consider. If your answer to that question is yes, however, you have a second question. Was the defendant's negligence the proximate cause of the injury to the plaintiff? If your answer is no, then your verdict should be for the defendant. If your answer to this question is yes, then your verdict must be for the defendant because, as I have explained to you, one who is guilty of contributory negligence may not recover. If your answer to the question of contributory negligence is no, then you proceed to the question of damages and arrive at a single figure which in your opinion will compensate the plaintiff for all of the elements of the damage which you find that he has suffered.

With reference to your verdict for the plaintiff, if you find for him, your verdict is in a single amount. By that I mean you do not allocate a separate amount in your verdict to doctor bills or hospital bills or pain and suffering or loss of wages, you return a single verdict in a single amount to represent all of the elements of damage, if any, which you find the plaintiff has suffered as a result of negligence and proximate cause and a freedom from contributory negligence on his part.

Will counsel come to the bench.

(At the Bench:)

THE COURT: The Court will assume for the record that counsel for the plaintiff and the defendant renew all requests for prayers which were submitted to the Court. The Court will assume that both counsel

repeat any objections made to any previous prayers offered and that you continue or renew objections to all opponent's prayers to which an original objection was made. The Court will assume that all counsel reiterate an ojbection to the declaration by the Court to grant any prayer which has been submitted to which you previously objected.

Now, Mr. Genn, do you request any further charge?

MR. GENN: No further charge, Your Honor.

THE COURT: Do you have any objection to the charges given?

MR. GENN: Yes.

THE COURT: What is your objection?

MR. GENN: I will state that the instruction on unavoidable accident I believe is not applicable to this case based upon the facts. That cannot apply to these facts: on the defendant's theory of the case, it was avoidable; on the plaintiff's theory, it was avoidable by the defendant.

THE COURT: Very well. That objection is a matter of record.

Now, do you have any other objections to make?

MR. GENN: Yes. In two places, Your Honor stated that contributory negligence bars the claim of the plaintiff. I believe this to be an incorrect statement of law; that the true statement of law is that contributory negligence will bar his recovery only if that contributory negligence is a proximate contributing cause.

THE COURT: The Court stated that contributory negligence was the negligence on the part of the plaintiff which, combined in some degree with the negligence of another, helps in proximately causing the injury.

Your objection to the charge as given is a matter of record.

MR. GENN: I have one other objection -- the presumption of due care I do not believe is applicable upon the evidence in the case, therefore, should not be given.

THE COURT: Your objection is a matter of record.

MR. GENN: I also would request of the Court this further point: You made a statement to the jury that they have a right to request the

exhibits that were admitted in evidence. I would request that the Court make mention also that there was a stipulation as to the $518.10 hospital expense as part of the evidence.

THE COURT: There is no hospital bill in evidence.

MR. GENN: It was stipulated, Your Honor.

THE COURT: Very well. The Court will point that out to the jury.

MR. GENN: Since Your Honor has stated you assume we renew all other objections, that is all I have.

THE COURT: Mr. McInerney, do you request any further charges?

MR. McINERNEY: No, Your Honor.

THE COURT: Do you have any objection to the charge as given?

MR. McINERNEY: No, Your Honor.

THE COURT: Very well.

* * * *

THE COURT: The jury may retire, Mr. Marshal.

(Whereupon, at 12:30 p.m., the jury retired to the jury room to deliberate upon its verdict.)

* * * *

(Whereupon, at 4:45 p.m., the following proceedings were had:)

THE COURT: The Court will at this time excuse the jury, which has not yet reached a verdict, until tomorrow morning, gentlemen.

(Whereupon, the jury returned to the courtroom:)

* * * *

(Whereupon, the jury retired from the courtroom.)

THE COURT: Gentlemen, a moment before coming on the Bench, the Court was handed by the marhsal a note from the foreman of this jury, which reads as follows: "The jury cannot come to an agreement. Can the judge give us further instruction?"

I propose in the morning to charge the jury further by paraphasing

the Allen charge and pointing out to them that they have heard all of the evidence which counsel was able to produce in this case. In essence that some jury must decide this case at some time, and ask them to deliberate further.

I will state that if a majority of the jurors are in favor of a verdict for the plaintiff, the minority should carefully consider their position; and similarly, that if the majority are in favor of a verdict for the defendant, again the majority should consider their position in the light of the fact that certain evidence apparently made no such impression upon other jurors equally honest and equally intelligent with themselves. The phraseology will be identical in reference to the situation where the majority find a verdict in favor of the plaintiff and, secondly, where the majority find in favor of the defendant.

The Court will instruct the jury that while the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The Court will instruct the jury that after due consideration should the majority agree to a verdict which is contrary to his honest belief and convictions in the case, he should not surrender honest convictions merely for the purpose of arriving at a verdict.

In short, I will paraphrase the accepted version on the Allen charge that they should reach a verdict if they can do so without doing harm to their own conscience.

* * * *

FURTHER CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the jury, the Court has received the note from your foreman indicating that you had some difficulty in reaching a unanimous verdict in this case.

There are certain observations which the Court is permitted to make to you by way of further charge that may be of some assistance to

you in reaching a verdict in this case.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement if you can do so without violence to your individual judgment. To each of you, I say that you must decide the case for yourself but you should do so only after discussing it with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. You should not be influenced to vote in any way on any question submitted to you by the single fact that a majority of the jurors, or any of them, favor a particular decision or hold an opinion at variance with your own. In other words, you should not surrender your honest convictiions concerning the effect or weight of evidence for the mere purpose of returning a verdict or soley because of the opinion of other jurors.

While undoubtedly the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimous agreement by comparison of views and by arguments among the jurors themselves.

Each juror should listen with deference to the arguments of other jurors and with a distrust of his own judgment if he finds that a large majority of the jurors take a different view of the case from that which he himself takes. No juror should go to the jury room with a blind determination that the verdict should represent his opinion of the case at that moment or that he should close his ears to the arguments of other jurors who are equally honest and equally intelligent with himself.

Accordingly, although the verdict must be the verdict of each individual juror and not a mere acquiescence in the conclusion of your fellow jurors, the Court instructs you that you should examine the issues submitted with candor and with a proper deference to the opinions of each other. It is your duty to decide this case if you can conscientiously do so.

I might point out that the attorneys have placed before you all the evidence that they have been able to develop in this case and that some day, some place, some time, some jury must reach a verdict in this case.

You should listen to each other's arguments with a disposition to be convinced. If much the larger number of jurors are for the plaintiff, a dissenting juror should consider whether his doubt is a reasonable one when it made no such impression upon the minds of so many of the other jurors, equally honest and equally intelligent minds with his own. If, on the other hand, the majority of the jurors are for the defendant, the minority ought to ask themselves whether they might not reasonably doubt the correctness of their judgment which was not concurred in by the majority.

I say to you again, you should not change your honest opinion solely for the purpose of reaching a verdict but you should listen to the discussion, the argument of your fellow jurors with a mind to being convinced and reach a verdict if you can conscientiously do so.

Will counsel come to the bench.

(At the Bench:)

THE COURT: Do you have any objections, Mr. Genn, to the Court's further instructions to the jury?

MR. GENN: I have already indicated the previous one that I thought it was premature. In addition, it is a matter of phraseology: You said that if much the larger number of jurors are for the plaintiff, then the minority should give consideration. You said, if a majority of the jurors are for the defendant, the minority should give consideration. I think "much the larger" should be applicable to both sides. This charge is not intended, in my opinion, to be applied where the jury is seven to five; it is intended to apply where there is one or two dissenting jurors. I, therefore, feel that "much the larger" applies to both sides, for the plaintiff and for the defendant.

THE COURT: Your objection is a matter of record.

Is there anything else?

MR. GENN: No, Your Honor.

THE COURT: Mr. McInerney, do you have any objection to the Court's further instructions to the jury?

MR. McINERNEY: No, Your Honor.

THE COURT: Very well.

THE COURT: In light of these further instructions to you, ladies and gentlemen of thejury, I am going to ask you to return to the jury room and consider this case further.

(Whereupon, at 10:10 a.m., the jury retired to the jury room to resume its deliberations upon a verdict.)

* * * *

THE COURT: In your case, gentlemen, the Court has received a further note from the jury which states, "The jury has been unable to reach a verdict and sees no possiblity of reaching one. It asks to be dismissed from the case."

In view of the statement "no possibility of reaching one", the Court will bring the jury in to the courtroom and discharge them.

(Whereupon, the jury returned to the courtroom and the following ensued:)

THE COURT: Who is the foreman of the jury?

THE FOREMAN: (Standing).

THE COURT: Madam Foreman, your note indicates thay you have not reached a verdict and you see no possibility of reaching one; is that the status of the case at this time?

THE FOREMAN: That is correct.

THE COURT: Very well. The Court will excuse the jurors from further service in this case. This means, of course, that another jury will be selected at a later date if this case is to be tried again. In other words, there has been no disposition of the case at this point.

I understand the difficulties I think which have confronted you in this situation. I think the question of preponerance of the evidence is the difficulty in the case and I had anticipated your difficulties when you retire to the jury room.

You are excused to return to the jurors' lounge.

(Whereupon, at 11:08 a.m., the jury was excused.)

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16 496

LOUIS KUZMINSKY,

Appellant,

v.

LEROY WOODARD,

Appellee.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit
FILED MAR 1 1952
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STATEMENT OF QUESTIONS PRESENTED

First: In the opinion of the Appellee, this question should be whether the plaintiff failed to carry his burden of proof to show negligence of the defendant in a personal injury case and by reason of this failure the Court was justified in directing a verdict for the defendant.

Second: The Appellee will accept the second question of the Appellant and the subparagraphs thereunder.

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*Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS

For The District Of Columbia Circuit

No. 16,496

LOUIS KUZMINSKY,

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APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

The Appellee will accept the Statement of the Case in the Appellant's brief.

SUMMARY OF ARGUMENT

I. The action of the Court in directing a verdict for the defendant was proper in that the plaintiff failed to prove sufficient facts or facts from which an inference could be drawn of negligence of the defendant.

II. The Appellant has requested relief from the granting of the motion for directed verdict as the primary issue. The Appellee states that there was no error in the granting of the motion for directed verdict and this should be the sole issue.

III. The Appellant has requested secondary relief if this Court finds that the lower court erred in directing a verdict for the defendant. If the case is to be retried, the Appellant is requesting this Court to rule on other alleged errors of the lower court which might or might not be applicable to evidence introduced in a second trial unless the testimony and evidence in a second trial would exactly follow that of the first trial. And if the testimony in a second trial would exactly follow that of the first trial, the contention of the Appellee would be that he would be entitled to a verdict on the same evidence in the second trial.

When the Appellant requests primary relief from the granting of the motion for directed verdict with a request for secondary relief, the effect is that the primary request is actually the only request.

ARGUMENT

I

THE ACTION OF THE COURT IN DIRECTING A VERDICT FOR THE DEFENDANT WAS PROPER IN THAT THE PLAINTIFF FAILED TO PROVE SUFFICIENT FACTS OR FACTS FROM WHICH AN INFERENCE COULD BE DRAWN OF NEGLIGENCE OF THE DEFENDANT.

The plaintiff in his testimony in no way established negligence on the part of the defendant. He stated that he stopped on the east curb of Georgia Avenue and in looking north and south did not see any traffic moving on Georgia Avenue in a southerly direction but saw a motor vehicle proceeding north on Georgia Avenue. He then took about seven or eight steps and stopped in a crosswalk at a distance of approximately seventeen inches from the outer rail of the southbound streetcar tracks. Notwithstanding that traffic coming from his left, which would be southbound traffic on Georgia Avenue and his immediate concern, he did not look to

see if there was southbound traffic and as he started to turn his head he was hurt (J.A. 26, 27, 32). Regarding the actual point of impact, the plaintiff was not certain regarding the part of the automobile with which he collided except that it could have been the windshield on the right side of the car or possibly the side-view mirror. He further testified that he received an injury to his leg which could have been caused by the back or the front bumper and quite likely the back rather than the front of the automobile (J.A. 30-31). At no time did the plaintiff ever see the automobile with which he came in contact prior to the time of impact.

The plaintiff called as a witness Mr. Irving Tittlebaum (J.A. 33), who testified in chief that he saw the plaintiff standing in the crosswalk. Mr. Tittlebaum was operating a motor vehicle west on Otis Place and had stopped at the stop sign at Otis Place prior to entering Georgia Avenue (J.A. 34). He further testified that he did not see the impact between the automobile operated by the defendant and the plaintiff. After looking to his left to determine whether there was any northbound traffic, he again looked at the plaintiff and saw that he had been struck by the automobile (J.A. 34). Under cross-examination, Mr. Tittlebaum testified that as he was in his stopped automobile he saw several cars coming down Georgia Avenue and a car coming up north upon which he was devoting his main attention (J.A. 35). He denied observing an automobile traveling south on the car tracks just prior to the time of impact but subsequently acknowledged a prior statement bearing his signature that he did notice a car coming south on Georgia Avenue in the streetcar tracks (J.A. 37). He noticed this car about a block away but not at the time of impact (J.A. 38), and that as the car came south it was on the streetcar tracks and remained on the streetcar tracks at all times and when it was brought to a stop it stopped on the streetcar tracks (J.A. 38).

Recognizing that the plaintiff himself and his witness did not establish negligence on the part of the defendant or from which an inference of negligence could be drawn, the defendant was called by the plaintiff as a witness in his behalf (J.A. 39).

The defendant testified that he was operating his automobile on the southbound streetcar tracks at a speed of about twenty-two miles per hour and when at the north end of the loading platform he saw the plaintiff standing on the platform. The defendant then testified that he decreased his speed from twenty-two miles per hour to about twenty miles per hour as he approached the intersection of Otis Place (J.A. 43, 44). He further testified that at all times as he was operating his car he was parallel to the loading platform and had the plaintiff under observation; that he felt a brushing effect against the car and in looking in his rear vision mirror he realized that the side of his automobile had come into contact with the individual he had seen standing on the platform (J.A. 45, 47). He stopped immediately and returned to where the plaintiff had fallen (J.A. 45, 46).

In substance, the only actual difference in the testimony of the plaintiff and that of the defendant was that the plaintiff placed himself in the crosswalk within the protective confines of the loading platform, and the defendant placed the plaintiff on the southern tip of the loading platform.

Much has been said by the Appellant in his brief, at pages 15, 16 and 17, to the effect that the jury if it wished could have rejected oral testimony and indulge in certain inferences entirely unrelated to any testimony presented by the plaintiff. If this assumption be correct, then it would follow that in any negligence case involving an automobile and a pedestrian, the plaintiff would be relieved entirely of his burden and the defendant's responsibility, if any, would be established by the jury on pure speculation and conjecture in utter disregard of the testimony produced by the plaintiff to carry his burden of proof.

In The Pennsylvania Railroad Company v. Pomeroy, 99 U.S. App. D.C. 272, 239 F. 2d 435, this Court stated (p. 281):

> "It is axiomatic that, to prevail in a negligence case, a plaintiff must prove sufficient facts, not only to warrant an inference of negligence, but also to justify an inference

that such negligence was proximately related to the injury or death. Tennant v. Peoria & P.U. Ry. Co., 1944, 321 U.S. 29, 32, 64 S. Ct. 409, 88 L. Ed. 520; Hernandez v. Southern Union Gas Co., 10 Cir., 1954, 209 F. 2d 606, 610. As we stated in Collins v. District of Columbia, 1931, 60 App. D.C. 100, 102, 48 F. 2d 1012, 1014:

> "' The causal connection between the accident and the negligence of the defendant must not be left to mere conjecture or supposition.' "

This Court reiterated its position in Skinner v. Koontz, 109 U.S. App. D.C. 73, 284 F.2d 207.

The plaintiff raises no question but that he came into contact with the side of the automobile of the defendant after the front part of the automobile had passed him. In operating his automobile, the defendant was exercising due care and caution and was not in violation of any rule of the road or traffic regulation. The plaintiff was guilty of primary negligence in stepping into the side of the automobile and to justify a verdict for the plaintiff the jury would have no alternative except to indulge in sheer speculation and conjecture.

In Capital Transit Co. v. Gamble, 82 U.S. App. D.C. 57, 160 F.2d 283, this Court held (p. 58):

> ". . . But where, as here, the evidence as to primary negligence produced by the plaintiff is so weak that to submit it to a jury would be to allow them to speculate as to the defendant's negligence the question of contributory negligence does not enter and the court should rightfully exercise its lawful discretion and withhold that evidence from the jury. Appellant's motion for a directed verdict made at the conclusion of the evidence should have been granted. . . ."

This case and every case must of necessity be decided on the facts of that case and in conformity with applicable law. In the present case, according to the testimony of the plaintiff, he was standing in a crosswalk and had been standing there for some time. According to the testimony of the defendant, the plaintiff was standing at the southern tip of the loading platform as the defendant saw him while proceeding south on

Georgia Avenue. It was daylight at the time and nothing to prevent the plaintiff from observing the defendant's automobile traveling south on Georgia Avenue. In either event, the defendant was not negligent nor is any attempt made to establish negligence. An attempt is made, however, to invoke the right-of-way law with respect to a pedestrian in a crosswalk. The plaintiff in this case, according to his testimony, was not using the crosswalk in the sense of being in motion or in such a way that would indicate that he was walking in it but, on the contrary, would indicate, according to his own testimony, that he was standing in a crosswalk. It is submitted that the law applicable to the use of a crosswalk by a walking pedestrian differs from the circumstances of this case. Steger v. Cameron, 71 App. D.C. 202, 204, 109 F.2d 347, cited by the Appellant, is a situation where the pedestrian was walking. Griffith v. Slaybaugh, 58 App. D.C. 237, 29 F. 2d 437, involves the right-of-way law in the use of a crosswalk being used as a walk.

Being unable to show negligence by direct proof or from which an inference could be drawn, the Appellant attaches considerable importance to the fact that he was not granted an instruction on "last clear chance" by the lower court.

It is submitted that failure to prove negligence in itself also defeats the application of the doctrine of last clear chance.

Richardson v. Gregory, 108 U.S. App. D.C. 263, 281 F.2d 626, differs in that the plaintiff in the instant case presented no evidence indicating any overhang of the defendant's car and certainly no element of inattention on the part of the operator of the defendant's car. In addition, there is no evidence to indicate a perilous situation having been created or existing through the negligence of both the plaintiff and the defendant and, as stated in Richardson v. Gregory, supra (p. 265):

> "The last clear chance doctrine 'presupposes a perilous situation created or existing through the negligence of both the plaintiff and the defendant, but assumes that there was a time after such negligence had occurred when the defendant could, and the plaintiff could not, by

the use of means available, avoid the accident.' Dean v. Century Motors, Inc., 1946, 81 U.S. App. D.C. 9, 10, 154 F.2d 201, 202."

In Conlon v. Tennant, 110 U.S. App. D.C. 140, 289 F.2d 881, this Court held that a jury could find certain facts by accepting some of the evidence of each litigant, making the last clear chance instruction appropriate, but it is difficult to believe that this Court in Conlon was approving any departure from The Pennsylvania Railroad Company v. Pomeroy, supra, relieving the plaintiff of his burden to prove negligence and substituting under the theory of last clear chance speculation and conjecture on the part of the jury.

The court submitted this case to the jury and after lengthy consideration, when the jury was unable to reach a verdict, directed a verdict for the defendant, following the procedure authorized by the Federal Rules of Civil Procedure, Rule 50b, and Williams v. Greenblatt, 106 U.S. App. D.C. 335, 272 F.2d 564.

This brief has been pointed to the first question presented by the Appellee and Paragraph I of the Summary of Argument. It is not felt necessary to assert argument with respect to Paragraphs II and III of the Summary of Argument inasmuch as the primary relief requested by the Appellant is from the directed verdict for the defendant and, as stated in the Summary of Argument, should this Court order a new trial it is rather difficult to understand how a "blueprint" could be created in this appeal to govern the conduct of another trial.

CONCLUSION

The Appellee states that the judgment of the court below was correct and the judgment entered for the defendant should be affirmed.

Respectfully submitted,

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